Supreme Court, U.S.
FILED
JUN 15 1999
OFFICE OF THE CLERK

No. 99 346

IN THE
SUPREME COURT OF THE UNITED STATES

GLENN BOGGIA,

Petitioner,

v.

UNITED STATES OF AMERICA,
CHARLES M. CARBERRY, Chief Investigator,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JESSE S. DRUCKER
Counsel of Record
3380 Veterans Memorial Hwy.
Bohemia, New York 11716
(516) 737-3330

Attorney for Petitioner

3699

QUESTIONS PRESENTED

1. Did the union disciplinary panel that recommended Petitioner's expulsion from union membership have jurisdiction to decide the charges against Petitioner?

2. In this case of first impression, where the United States District Court for the Southern District of New York has exclusive original jurisdiction to review union disciplinary hearings overseen by a court-appointed review board, did the district court err in not stating a basis for affirming the decision to expel Petitioner from union membership?

3. Did the Court of Appeals for the Second Circuit err in affirmatively declining to apply a standard of review to its examination of the decision to expel Petitioner from union membership?

4. Did the Court of Appeals err in disregarding Petitioner's objections to tape recorded evidence upon which union disciplinary charges were based?

5. Did the Court of Appeals err in not determining that hearsay evidence supporting union disciplinary charges against Petitioner was not independently corroborated and, therefore, insufficient to support Petitioner's expulsion from union membership?

6. Should the substantial evidence standard of review applied by the court below in United States v. IBT (Giacumbo), 170 F.3d 136 (2d. Cir., 1999) be given retroactive effect?

LIST OF PARTIES

The Petitioner, Glenn Boggia, was the respondent in a union disciplinary proceeding commenced pursuant to United States v. International Brotherhood of Teamsters et al., 88 CV 4486 (DNE), Southern District of New York, and affirmed by the said court; the appellant to the United States Court of Appeals for the Second Circuit. Respondents, the United States of America and Charles M. Carberry, the Chief Investigator of the Independent Review Board, a body established as a result of the consent decree in settlement of the matter above, were the Plaintiffs and Appellees below. In this Petition, the parties will be referred to as the Petitioner and Respondent and, alternatively, by name. The reference "App." will refer to the rule-required appendix accompanying this Petition. All emphasis has been supplied by counsel unless otherwise indicated to the contrary.

TABLE OF CONTENTS

Page

Questions Presented..... *i*

List of Parties..... *iii*

Table of Contents..... *iii*

Table of Cited Authorities..... *vii*

Jurisdictional Statement..... 1

Statement of the Case..... 1

A. THE UNDERLYING PROCEEDING..... 1

1. The Underlying Civil RICO Action and Consent Decree Against the International Brotherhood of Teamsters..... 1

a. The Independent Review Board..... 2

b. The Procedural Aspects of the Referral and Hearing..... 3

2. The Action Against Local 282..... 5

B. THE CHARGES AND PROCEEDINGS AGAINST PETITIONER.....5

1. The Charges Against Petitioner.....6

2. The Basis for the Charges Against Petitioner 7

3. Petitioner's First Disciplinary Hearing.....8

4. Petitioner's Second Disciplinary Hearing.....8

a. The Evidence Against Petitioner..... 8

b. The Presentation of the Evidence Against Petitioner..... 10

c. Petitioner's Objections..... 10

d. The IBT Decision..... 11

5. The Review Board Determination and the District Court's Order..... 12

C. THE STANDARD OF REVIEW..... 12

ARGUMENT..... 16

A. THE COURTS ARE WITHOUT JURISDICTION TO REVIEW THIS MATTER..... 16

B. THIS MATTER WAS NOT DECIDED ON SUBSTANTIAL EVIDENCE..... 17

1. No Independent Investigation By Any Of The Charging Parties.....18

2. The Charging Parties' Exclusive Reliance on the FBI Reports..... 18

3. The Reviewing Court Also Erred in Regard to the Hearsay Evidence Presented..... 21

C. IN THE ALTERNATIVE, THE DECISION IN UNITED STATES V. IBT, (GIACUMBO), 170 F.3d 136 (2d. Cir., 1999), SHOULD BE GIVEN RETROACTIVE EFFECT..... 24

CONCLUSION..... 27

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Aquarius Marine Co. v. Pena
64 F.3d 82, 87 (2d Cir., 1995) 26

Chevron Oil Company v. Huson,
404 U.S. 97, 92 S.Ct. 349 (1971) 25

Chrysler Corporation v. U.S. Environmental
Protection Agency, 631 F.2d 865 (D.C. Cir., 1980) 14

Cipriano v. City of Houma
395 U.S. 701, 89 S.Ct. 1897 (1969) 25

International Brotherhood of Boilermakers v. Hardeman
401 U.S. 233, 91 S.Ct. 609 (1971) 12, 13

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct.1731 (1965). 25

Midtec Paper Corp. v. United States, 857 F.2d 1487
(D.C. Cir., 1988) 15

Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420 (1971) 18

United States v. Carmona, 873 F.2d 569 (2d Cir., 1989) 22

United States v. IBT (Boggia) 167 F.3d 113 (2d Cir., 1999) 13

United States v. IBT (Cimino),964 F.2d 1308
(2d Cir., 1992) 10

United States v. IBT (DiGirlamo), 19 F.3d 816,
(2d Cir., 1994) *cert. denied* 513 U.S. 873,
115 S.Ct. 199 (1994) 13, 15, 16

United States v. IBT (Friedman & Hughes),
905 F.2d 610 (2d Cir. 1990) 2, 13

United States v. IBT (Giacumbo), 170 F.3d 136
(2d. Cir., 1999) 24, 25, 26

U.S v IBT (Review Board Rules),
803 F. Supp. 761 (S.D.N.Y. 1992)
aff'd as modified, 998 F.2d 1101 (2d Cir.),
on remand, 829 F.Supp.
602 (S.D.N.Y. 1993) 2, 3, 4, 13, 14, 16

United States v. IBT (Review Board Rules)
998 F.2d 1101 (2d Cir. 1993) 2

United States v. IBT (Sansone), 981 F.2d 1362
(2d Cir., 1992) 15

United States v. IBT (Senese & Talerico), 941 F.2d 1292
(2d Cir.) *cert. denied* 502 U.S. 819
112 S.Ct. 76 (1991) 17, 21

United States v. IBT (Simpson)
120 F.3d 341 (2d Cir., 1997) 13, 14, 15

United States v. IBT (1991 Election Rules Order)
931 F.2d 177 (2d Cir., 1991) 2

United States v. Local 282 of Int'l Bhd. of Teamsters
No. CV-94-2919 (TCP) (E.D.N.Y.) 5

United States v. Long, 917 F.2d 691 (2d Cir., 1990) 23

United States v. Prescott, 920 F.2d 139 (2d Cir., 1990) 22

United States v. Sorrentino, 72 F.3d 294 (2d Cir., 1995) 24

Statutes

28 U.S.C. §1331 1

28 U.S.C.§1254(1) 1

Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1964 1

Administrative Procedure Act 13

5 U.S.C. §706 14

Other Authorities

IRB Review Board Rules, Section I(4) 4

IRB Review Board Rules, Section I(5) 4

IBT Constitution, Article XIX, Section 1(a) 4

IBT Constitution, Article II, Section 2(a) 6

IBT Constitution, Article XIX, Section 7(b)(1) 6

IBT Constitution, Article XIX, Section 7(b)(2) 6

IBT Constitution, Article XIX, Section 14(c)(1) 3

JURISDICTIONAL STATEMENT

Petitioner, respectfully requests this Court issue a Writ of Certiorari to the Court of Appeals for the Second Circuit to review the decision of said Court, in the within matter, duly filed by the Clerk of the Court on February 4, 1999.

Subject matter jurisdiction lies pursuant to 28 U.S.C. §1331. This Court's jurisdiction to review on a writ of certiorari lies pursuant to 28 U.S.C.§1254(1). On or about April 28, 1999, the Hon. Ruth Bader Ginsburg granted an extension of time to file this Petition to and including June 15, 1999.

STATEMENT OF THE CASE

A. THE UNDERLYING PROCEEDINGS

1. The Underlying Civil RICO Action and Consent Decree Against the International Brotherhood of Teamsters

The underlying action stems from a civil action filed by the United States on June 28, 1988 under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1964, against the International Brotherhood of Teamsters ("IBT"), its General Executive Board ("GEB"), the eighteen members of the GEB, the Commission of La Cosa Nostra, and various members and associates of La Cosa Nostra. United States v. IBT (1991 Election Rules Order), 931 F.2d 177, 180 (2d Cir., 1991).

The original complaint alleged that La Cosa Nostra had dominated the IBT through a pattern of racketeering activity. Id. The Government sought extensive equitable relief to eradicate La Cosa Nostra's corrupt influence over the union. Id.

On March 14, 1989, the United States District Court for the Southern District of New York (Edelstein, J.) approved the Consent Decree, which resolved the Government's claims against the IBT defendants. *See, e.g.*, United States v. IBT ('Friedman & Hughes"), 905 F.2d 610, 613 (2d Cir. 1990) (summarizing disciplinary provisions); United States v. IBT ("1991 Election Rules Order"), 931 F.2d 177, 180-81 (2d Cir., 1991); United States v. IBT (Review Board Rules"), 998 F.2d 1101, 1105-06 (2d Cir. 1993) (summarizing provisions relating to Review Board).

a. The Independent Review Board

Inter alia, the consent decree provided for the establishment of an Independent Review Board ("IRB" or "Review Board") to oversee disciplinary reform of the IBT. The IBT came into existence subsequent to the certification of the IBT's 1991 election. The operation of the Review Board is controlled by detailed rules (the "Review Board Rules") approved by the district court and the Second Circuit Court of Appeals. United States v. IBT (Review Board Rules), 803 F. Supp. 761 (S.D.N.Y. 1992), *aff'd as modified*, 998 F.2d 1101 (2d Cir.), *on remand*, 829 F.Supp. 602 (S.D.N.Y. 1993). Under the Consent Decree and the Review Board Rules, the three-member Review Board is vested with broad investigative and disciplinary powers

delegated by the officers of the IBT. The Consent Decree provides that "the [Review Board] shall exercise such investigative authority as the General President and General Secretary-Treasurer are presently authorized and empowered to exercise pursuant to the . . . IBT Constitution, as well as any and all applicable provisions of law." United States v. IBT, 829 F. Supp at 605. The Review Board may exercise this authority to investigate, among other things, allegations of corruption and organized crime influence within the IBT. Id.

The Review Board must refer all disciplinary matters to the IBT before conducting a hearing. Matters are referred in the form of a Review Board Investigative Report which sets out charges, findings, and recommendations. Id. In this manner, the IBT is thus afforded the first opportunity to take "whatever action is appropriate under the circumstances." The Review Board retains the authority to monitor those matters it refers to the IBT. The Review Board convenes its own hearing only if the IBT's resolution of the matter is determined to be "inadequate," or if the IBT refers the matter back to the Review Board. Id.

b. The Procedural Aspects of the Referral and Hearing

As described above, disciplinary matters are referred to the local unions pursuant to the Consent Decree. Authority for the referrals is also found in Article XIX, Section 14(c)(1) of the IBT Constitution. That authority clearly states that "[t]he Union entity to which the matter has been referred shall promptly take whatever action is

appropriate under the circumstances and shall within ninety (90) days of the referral make written findings setting forth the specific action taken and the reasons for the action." *See also* United States v. IBT (Review Board Rules), 829 F.Supp at 606. In addition, Article XIX, Section 1(a) of the IBT Constitution states: "A member or officer of a Local Union charged by any other member of the Local Union with any offense constituting a violation of this Constitution shall, unless otherwise provided in the Constitution, be tried by the Local Union Executive Board."

In the instant matter, as described below, pursuant to its authority under Section I(4) of the Review Board Rules, the Review Board instructed the local union Trustee that he had sixty (60) days within which to hold a hearing and to forward a final written report to the Review Board. Section I(5) of the Review Board Rules mandates that "[t]he entity shall resolve the referred matter within the time prescribed by the Review Board in the Investigative Report." United States v. IBT (Review Board Rules), 829 F.Supp. at 606.

Pursuant to the Consent Decree, the United States District Court for the Southern District of New York has exclusive original jurisdiction over appeals from the decisions of the Review Board. United States v. IBT (Review Board Rules), 829 F.Supp. at 608.

2. The Action Against Local 282

On June 21, 1994, the Government commenced a separate civil RICO action in the Eastern District of New York against Local 282, its General Executive Board, and various individuals. United States v. Local 282 of Int'l Bhd. of Teamsters, No. CV-94-2919 (TCP) (E.D.N.Y.). In January 1995, the United States and Local 282 resolved that separate action by entering into a consent judgment designed to eradicate any influence of organized crime or corruption over Local 282. The Local 282 Consent Judgment created a monitorship over Local 282 and established the positions of IBT Trustee, Corruption Officer, and Corruption Counsel. The Local 282 Consent Judgment authorized the Local 282 Corruption Officer to investigate allegations of corruption and to seek the expulsion of any member of Local 282 by referring the matter to the Review Board.

B. THE CHARGES AND PROCEEDINGS AGAINST PETITIONER

Prior to his expulsion in 1997, Petitioner was a member of IBT Local 282, which is located in Lake Success, New York. With approximately 3,000 members, Local 282 represents truck drivers and other workers responsible for transporting building materials to construction sites in the New York Metropolitan area. Petitioner joined Local 282 on July 3, 1974, as a driver. In 1976, Petitioner became a Working Teamster Foreman, also denoted as an "on-site steward." An on-site steward represents the union at a construction site and is responsible

for assuring the employers' compliance with the collective bargaining agreement.

1. The Charges Against Petitioner

In and around July 1995, the Local 282 Corruption Officer purportedly procured from the Federal Bureau of Investigation ("FBI") files concerning information about certain Local 282 officials and members, including Petitioner.

On March 16, 1996, the new Local 282 Corruption Officer referred Petitioner to the Review Board for disciplinary action after the Corruption Officer allegedly reviewed FBI files purporting to indicate that four years earlier, on April 7, 1992, Petitioner had accepted a bribe. On August 5, 1996, consistent with the Consent Decree, the Review Board prepared and forwarded a Review Board Investigative Report to Local 282, recommending that Local 282 initiate charges against Petitioner for allegedly bringing reproach upon the union and violating the IBT Constitution by participating in the alleged bribery scheme. On August 16, 1996, the IBT filed the Review Board's recommended charges against Petitioner and, as a result, Local 282 propounded the following union charges against Petitioner:

> While a member of Local 282, you brought reproach upon the IBT in violation of Article II, Section 2(a) and Article XIX, Section (7)(b)(1) and (2) of the IBT Constitution, to wit:

> On or about April 7, 1992, while a member of Local 282 and working for Browman Transportation, you accepted a $1,250.00 bribe from an individual known to you as Frank Falco to secure labor peace on a Queens, New York construction project.

Irrespective that the charge was filed on the recommendation of the Review Board, and a hearing should have been conducted by a local union panel, the local union Trustee transferred the case from Local 282 to the IBT for hearing.

2. The Basis for the Charges Against Petitioner

The entire case against Petitioner, the Review Board "Investigative Report," consists of sixteen (16) exhibits and a tape recording of a purported conversation between Petitioner and a paid informant. The record of the case contains no authentication of the materials comprising the "Investigative Report," no explanation of their origin, nor any justification of the release of law enforcement documents to the Corruption Officer.

Purportedly, the Local 282 Corruption Officer investigated the allegations against Petitioner prior to conveying those allegations to the Review Board's Chief Investigator. The hearing reveals that no such investigation was performed; rather, the Corruption Officer merely

collected the material made available from the FBI without attempting to independently corroborate the allegations or even attempting to interview witnesses critical to the allegations.

3. Petitioner's First Disciplinary Hearing

On October 16, 1996, then IBT General President Ron Carey ("Carey") appointed an IBT disciplinary panel to hear the charges against Petitioner. Following a hearing, the panel concluded that the charges against Petitioner had been proven and recommended to Carey that Petitioner be permanently expelled from the IBT. On February 12, 1997, Carey issued a decision adopting the hearing panel's recommended sanction. Petitioner requested that the Review Board review the IBT's disciplinary action.

On April 15, 1997, the Review Board directed the IBT to conduct a new hearing on the ground that the panel had not provided Petitioner with the exhibits to the Review Board Investigative Report at least ten days prior to the hearing. On June 6, 1997, Carey appointed a new hearing panel.

4. Petitioner's Second Disciplinary Hearing

a. The Evidence Against Petitioner

The new hearing panel appointed by Carey conducted its hearing on June 25, 1997. At the hearing, the IBT's evidence relating to the charges consisted principally of five exhibits: 1) an FBI report dated April 8, 1992 stating

that on April 7, 1992 an informant was equipped with a recorder to record a conversation with Petitioner and a man named Anthony Lewis; 2) an April 8, 1992 FBI memo stating that the informant was allegedly provided with "marked" bills on April 7, 1992, including $1,250.00 in an envelope labeled "Boggio;" 3) a surveillance log dated April 7, 1992 in which it is alleged that the informant met at a diner with Petitioner and one Anthony Lewis. Importantly, the log does not indicate that any money or an envelope exchanged hands between Petitioner and the informant, but states only that Petitioner and the informant met together at a diner and in a car; 4) an FBI memo describing the interview with the informant in which the informant claims Petitioner took an envelope during their meeting on April 7, 1992. Parenthetically, no report was presented concerning any search of the informant to eliminate the question that the informant may have sequestered the money rather than have given it to Petitioner,[1] nor was there an accounting for a fifteen (15) minute interval where the informant was out of surveillance after the meeting with Petitioner. Additionally, although the bills were purportedly "marked," the Review Board never presented an FBI report indicating that Petitioner ever possessed or negotiated the bills he purportedly accepted for the bribe, nor was evidence ever presented that the marked bills were ever accounted for; and 5) the purported transcript of the conversation between Petitioner

---

1 The Local 282 Corruption Officer, a former police lieutenant, testified at the union disciplinary proceeding that the proper procedure would have been to search the informant in order to assure that he had not sequestered the money.

and the informant. No attestation was included that the transcript was accurate or final. *See* United States v. IBT (Cimino), 964 F.2d 1308, 1312 (2d Cir., 1992) (Reliability of hearsay testimony as a result of attestation). Nor was the chain of custody of the tape assured, an important fact in light of Petitioner's contention that the tape had been physically altered. As to Petitioner, the transcript is exceedingly brief, with the informant doing most of the talking.

b. The Presentation of the Evidence Against Petitioner

Little effort was made to prove the charges against Petitioner. The individual presenting the charges relied on the Review Board report and the exhibits and simply played the tape of the purported April 7, 1992 conversation between Petitioner and the informant. The panel was provided with a transcript prepared by the FBI of that tape recording. The informant was not called to testify. No witnesses with knowledge were presented to support the charges, nor was any evidence from any FBI or law enforcement source introduced to verify, authenticate, or corroborate the selected compilation of law enforcement documents used against Petitioner.

c. Petitioner's Objections

At the hearing, Petitioner objected to the charges preferred against him, to his not being permitted to have counsel present, and to procedural deficiencies in the

manner the hearing was being conducted. Inter alia, Petitioner objected that

1) The hearing was illegally constituted in that the IBT General President and the General Executive Board were not authorized to conduct a hearing on the charges, pursuant to the IBT Constitution.

2) The hearing was not convened in a timely manner pursuant to the IBT Constitution or the Review Board Rules.

3) The tape recording of the conversation between Petitioner and the informant was corrupted in that, (a) there appeared to be a hum simultaneously under the confidential informant's speech which would indicate some sort of re-recording, (b) there appeared to be a splice or edited section within the informant's speech, (c) speech attributed to Petitioner seems to have been overdubbed, (d) the voice of an unidentified party appears on the tape.

d. The IBT Decision

The hearing panel issued its written findings and recommendations finding that "Petitioner accepted the bribe offered to him by the informant on April 7, 1992 for the purpose of securing labor peace at a construction project." The panel found that the "tape recording clearly demonstrates - that Petitioner accepted an envelope containing $1,250 from [the informant]," rejecting Petitioner's statements that he did not accept a bribe. The

panel recommended that Petitioner be permanently expelled from membership in the IBT and its affiliates, and barred for life from accepting or seeking IBT employment. IBT General President Carey adopted the panel's recommendation in its entirety.

5. The Review Board Determination and the District Court's Order

On October 24, 1997, Petitioner requested that the Review Board again review the IBT disciplinary action pursuant to the authority granted the Review Board under the consent decree to monitor all matters it referred to the IBT. On December 17, 1997, the Review Board notified Petitioner of its determination that the IBT disciplinary action was "not inadequate." (App., p. 1). Petitioner requested review by the United States District Court for the Southern District of New York on January 8, 1998.

On March 9, 1998, the Review Board applied to the district court requesting that the Court enter the Review Board determination as an order. Petitioner opposed the application and on April 15, 1998, the district court upheld the determination in a one (1) sentence order. (App., p. 1). The appeal to the United States Court of Appeals for the Second Circuit followed.

C. THE STANDARD OF REVIEW

Internal union proceedings have traditionally been reviewed by the courts under a "some evidence" standard. *See* International Brotherhood of Boilermakers v.

Hardeman, 401 U.S. 233, 246, 91 S.Ct. 609, 617 (1971)("A stricter standard . . . would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs, and would require courts to judge the credibility of witnesses on the basis of what would be at best a cold record.").

The United States Court of Appeals for the Second Circuit has consistently maintained that the determination of the Review Board is due great deference by the District Court reviewing a Review Board decision. United States v. IBT (Boggia) 167 F.3d 113, 119 (2d Cir., 1999); *See also,* United States v. IBT (DiGirlamo), 19 F.3d 816, 820 (2d Cir., 1994) *cert. denied* 513 U.S. 873, 115 S.Ct. 199 (1994); United States v. IBT (Friedman & Hughes), 905 F.2d 610, 616-617 (2d Cir., 1990). The Review Board Rules provide for review of decisions of the Review Board under "the same standard of review applicable to review of final federal agency action under the Administrative Procedure Act." United States v. IBT (Review Board Rules), 829 F.Supp. at 608. Accordingly, under this standard the district court must treat a determination of the Review Board with "great deference," United States v. IBT (Simpson), 120 F.3d 341, 346 (2d Cir., 1997), and can reject a determination by the IBT only if the district court finds the Review Board determination to be:

1. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

2. contrary to constitutional right, power, privilege, or immunity;

3. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

4. without observance of procedure required by law;

5. unsupported by substantial evidence . . . ;

6. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

See United States v. IBT (Simpson) 120 F.3d at 346. (quoting 5 U.S.C. §706).

The Review Board monitors disciplinary action taken by the IBT to determine whether the IBT acted "in a lawful, responsible, and timely manner" and whether the IBT's resolution of the matter was "inadequate under the circumstances." United States v. IBT (Review Board Rules), 829 F.Supp. at 608. This circumstance is unique, in that the internal union proceeding is monitored by an external oversight entity with its own standard of review. As such, the lower standard of "some evidence" is inapplicable and the higher standard of "substantial evidence" applies.

Substantial evidence has been defined as "more than a mere scintilla [and] means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Chrysler Corporation v. U.S. Environmental Protection Agency, 631 F.2d 865, 890 (D.C. Cir., 1980);

See also United States v. IBT (Simpson), 120 F.3d at 346 (internal quotations and citations omitted).

Assuming that the reviewing court determines the finding is based upon substantial evidence, inferences based on those findings are discretionary and can only be disturbed if they are "arbitrary and capricious. When reviewing inferences, the courts are "oblige[d] . . . to guard against an agency [ ] drawing inferences that are 'arbitrary' in relation to the facts found, no matter how substantial may be the support for those facts." Midtec Paper Corp. v. United States, 857 F.2d 1487, 1498 (D.C. Cir., 1988).

However, as to each appeal that has come before it stemming from enforcement of the Consent Decree, the Court of Appeals has found it unnecessary to define the precise standard of review to be applied on appeal because in each case the Court concluded "that the district court's order should be affirmed under any arguable applicable standard of review." United States v. IBT (Simpson), 120 F.3d 341, 346 (2d Cir., 1997)(internal quotation marks omitted)(citing cases); *See also e.g.,* United States v. IBT (Sansone), 981 F.2d 1362, 1368 (2d Cir., 1992)(citing cases).

In summarily affirming the Review Board decision in a one (1) sentence finding without articulating a standard of review (App., p. 1), the district court abrogated its responsibility and thus turned the court below into the initial reviewing court. Under those circumstances, the Court of Appeals should have treated the decision of the Review Board with great deference, United States v. IBT

(DiGirlamo), 19 F.3d at 820, and in accord with the Consent Decree and the Review Board Rules. United States v. IBT (Review Board Rules), 803 F. Supp. 761 (S.D.N.Y. 1992), *aff'd as modified*, 998 F.2d 1101 (2d Cir.), *on remand*, 829 F.Supp. 602 (S.D.N.Y. 1993). As a result, it was error for the Court of Appeals not to articulate a standard of review in deciding the matter of Petitioner's expulsion from the IBT.

ARGUMENT

A. THE COURTS ARE WITHOUT JURISDICTION TO REVIEW THIS MATTER

As discussed above, by letter dated August 6, 1996, the Review Board referred the instant matter to the Local 282 Trustee under powers granted it through the Consent Order.

Without authority of any kind, the Trustee elected to transfer the case to the International Union for hearing. Even if the instant matter were not referred by the Review Board, no authority exists for the International Union to appoint a disciplinary panel requested by the local union Trustee who, in this case, is a member of the local union. As a result, the panel convened by IBT General President Carey to hear the matter below was illegally constituted and any decision or recommendation therefrom is of no effect. Petitioner contends that the Court below erred in not recognizing same.

Even assuming, arguendo, that the hearing panel was legally constituted, the Trustee failed to comply with the procedural mandates dictated by the Review Board Rules and the IBT Constitution. *See* The procedural clock commenced on August 6, 1996, the day the Investigative Report was transmitted to the Trustee. The sixty (60) day period mandated by the Review Board would have run on October 6, 1996. Assuming arguendo that the ninety (90) day Constitutional period would have applied, such period would have run on November 6, 1996. The panel did not conduct its hearing until November 20, 1996, almost two (2) weeks past the last conceivable date a written report was due. As a result of this procedural error, Petitioner contends that the courts below did not have subject matter jurisdiction over this issue and erred in not dismissing the matter before them.

B. THIS MATTER WAS NOT DECIDED ON SUBSTANTIAL EVIDENCE

Petitioner contends that the Court below erred in not finding that the decision to expel Petitioner from his twenty-four (24) year membership in the IBT was based upon insubstantial evidence.

There is no requirement that a disciplinary matter brought pursuant to a Review Board proceeding need be proven by direct rather than circumstantial evidence. Reliable hearsay is admissible in IBT disciplinary hearings, *See* United States v. IBT (Senese & Talerico), 941 F.2d 1292, 1297-98 (2d Cir.) *cert. denied* 502 U.S. 819, 112 S.Ct. 76 (1991), and may constitute substantial evidence to

support an administrative decision. *See* Richardson v. Perales, 402 U.S. 389, 402-06, 91 S.Ct. 1420 (1971).

The issue in the instant matter is the reliability of the evidence presented in support of the charges against Petitioner. For the reasons that follow, Petitioner contends that the decision of the Court below should be overturned as the evidence did not meet the minimal standards required in administrative proceedings.

1. No Independent Investigation By Any Of The Charging Parties

As described above, the Local 282 Corruption Officers did not conduct an independent investigation with respect to the allegations against Petitioner as they were required to do. It appears that the Review Board also did not investigate the matter before referring it to the local union.

2. The Charging Parties' Exclusive Reliance on the FBI Reports

The Review Board report relies exclusively on reports purportedly obtained from the Federal Bureau of Investigation. While this Petition does not address the question of how confidential FBI reports came into possession of the Local 282 Corruption Officer or the Review Board, there is no indication that that there was ever an attempt to corroborate any of the information contained in the reports that were the basis of the charges against Petitioner. Moreover, since the information was

produced by the same source, and the individuals involved in the production of the FBI material were all engaged in the same enterprise of attempting to prove Petitioner accepted a bribe, the reliability of the information contained in the reports is suspect abinitio without some independent corroboration.

Petitioner alleges he never accepted a bribe. However, assuming, arguendo, that the FBI reports and the tape recording of the purported bribe taking are somehow found to corroborate each other to prove that a bribe was accepted, there was no report that the confidential informant was ever searched after his meeting with Petitioner to ascertain whether the informant had sequestered the money. More importantly, the confidential informant was out of surveillance range for fifteen (15) minutes. In the interim, the confidential informant claimed that he drove "down Union Turnpike." This time period would have permitted the confidential informant to sequester the money allegedly given to Petitioner, or even give it to a confederate, before returning to the surveillance scene. Petitioner raised such objections below; however, the Court below ignored them.

Moreover, the only purported evidence in the FBI reports that Petitioner accepted payment of a bribe is in a report describing the confidential informant's debriefing. In this report, an FBI agent, who was not called as a witness by the charging parties, writes that the confidential informant "says" that Petitioner took the envelope. In view of the foregoing, it is self-evident that such statements do not meet the level of substantial evidence.

Furthermore, the FBI tape and transcript purporting to reproduce the conversation between Petitioner and the confidential informant is also suspect. During the hearing, Petitioner attempted to present expert reports concerning certain material discrepancies between the tape, the FBI transcript, and what the experts had heard on the tape. Inter alia, one of the experts opined that (a) there appeared to be a hum simultaneously under the confidential informant's speech which would indicate some sort of re-recording, (b) there appeared to be a splice or edited section within the confidential informant's speech, (c) speech attributed to Petitioner seems to have been overdubbed, (d) the voice of an unidentified party appears on the tape. Such additions and changes make a material difference in the substance of the conversation between the two individuals.

However, the hearing panel accepted the experts' reports concerning the tape only "for what it is worth," evidence that they were not accorded much weight in the panel's deliberation. The receipt of evidence in such a manner, along with the Chairperson's statement that the experts' reports could not be cross examined, establish that Petitioner's objections to the authenticity of the tape were disregarded. While testimonial evidence was required of Petitioner with regard to the tape recording, the charging party was not required to present any testimonial evidence or even authenticate the tape presented as the chief evidence against Petitioner, nor was the charging party required to present testimonial evidence to corroborate the documents which were the basis of the charges against Petitioner. This was error on the part of the reviewing court in overlooking these points.

3. The Reviewing Court Also Erred in Regard to the Hearsay Evidence Presented

Petitioner also contends that the court below erred in regard to the hearsay evidence presented in support of the charges against Petitioner.

Hearsay statements, so long as they are accompanied by a sufficient indicia of reliability are admissible in IBT proceedings. United States v. IBT, 941 F.2d at 1297-98. Hearsay statements gain reliability when corroborated by non-hearsay statements or by reliable independent sources. As described above, the charging party presented five (5) principal pieces of evidence against Petitioner. For the reasons that follow, the following hearsay documents lack reliability sufficient enough to be considered substantial evidence:

1) The events described in the FBI memo dated April 8, 1992 stating that the informant was supplied with money for a bride are uncorroborated. Petitioner stated that he never saw an envelope or any money.

2) The surveillance log maintained by the FBI dated April 7, 1992 only reports the information on the tape recording and does not independently corroborate same.

3) The informant's statements contained on the FBI memo of the interview conducted with the informant are not independently corroborated.

4) The purported transcript of the informant's meeting with Petitioner is based upon a flawed tape recording which has not been authenticated, nor has the tape's chain of custody been assured.

Petitioner will show this Court that the court below erred in finding that the statements of the informant made to the FBI agent subsequent to the surveillance, and the FBI agent's observation of the meeting between Petitioner and the informant, provide sufficient reliability upon which to ground the Review Board decision.

Although hearsay statements may corroborate each other, the court below erred in not determining that, as a result of the FBI agent and the informant being engaged in the same enterprise of proving Petitioner accepted a bribe, the corroboration was not sufficiently independent to make the hearsay evidence presented against Petitioner reliable. United States v. Prescott, 920 F.2d 139, 145 (2d Cir., 1990)(accounts relied upon were numerous and independent); United States v. Carmona, 873 F.2d 569, 575 (2d Cir., 1989)(sources sufficiently independent and similar to corroborate hearsay evidence).

Independent corroboration of hearsay evidence is especially important in this matter because of the glaring inadequacies in conducting the surveillance, the fifteen (15) minute interval following the informant's meeting with Petitioner where the informant was unobserved, the failure of the FBI agent to search the informant, and the failure to

ascertain whether Petitioner ever negotiated the allegedly marked money.

Furthermore, Petitioner will show that the court below erred in determining the taped statements of the informant to be reliable because they appeared to be corroborated by Petitioner's taped statements. First, the gravaman of the charges against Petitioner were based upon the informant's reports to the FBI. These reports were uncorroborated by any other independent source. The court below did not address these reports, discussing only the informant's recorded statements

Secondly, Petitioner contends that the presentation of Petitioner's own statements on the tape recording, while admittedly not hearsay, were unreliable because the unauthenticated tape was flawed as described by the expert reports Petitioner attempted to enter into evidence. In view of those obvious difficulties, the court below erred in not addressing them. United States v. Long, 917 F.2d 691, 700 (2d Cir., 1990)(No evidence that the reliability of the tapes had been assured.).

Moreover, even if the tape is reliable, the evidence presented to support the charges is not. Petitioner never took the bribe; the FBI did not search the informant to ascertain whether the informant had sequestered the money, there were fifteen (15) minutes unaccounted for from the termination of the conversation between Petitioner and the informant and the time the informant reported back to the FBI, and the FBI's "marked" bills, supposedly paid over to Petitioner, were never found. No proof was offered that

showed Petitioner ever possessed the money or negotiated the bills and Petitioner denied taking the bribe.

The informant was not called as a witness in the disciplinary proceeding. The court below determined that Petitioner was not denied his right to cross examine the informant. However, in so finding, the court overlooked Petitioner's right to test the credibility of the informant. *See* United States v. Sorrentino, 72 F.3d 294, 298 (2d Cir., 1995)(Informant called as a witness; statements on tape recording admitted to render intelligible what Defendant said in conversation.)

For all of the foregoing reasons, Petitioner respectfully requests that this Court grant the instant Petition.

C. IN THE ALTERNATIVE, THE DECISION IN UNITED STATES V. IBT (GIACUMBO), 170 F.3D 136 (2D. CIR., 1999), SHOULD BE GIVEN RETROACTIVE EFFECT

Oral argument before the Court of Appeals in the instant matter was held on December 10, 1998 and a decision was rendered on February 4, 1999. On or about April 20, 1998, the Court of Appeals held oral argument in the matter of United States v. IBT (Giacumbo), 170 F.3d 136 (2d. Cir., 1999), rendering a decision on March 2, 1999. (App., pp.21-44). Therein, the Court held that despite that court's prior holdings wherein the Court affirmatively declined to apply a standard of review, the Court's standard of review would henceforth be that of

substantial evidence. Giacumbo 170 F.3d at 142. Should this Court grant the instant Petition, Petitioner will request that this Court give retrospective effect to the decision of the lower court.

Generally, retrospective effect will be given to a decision if the decision to be applied nonretroactively establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Chevron Oil Company v. Huson, 404 U.S. 97, 106, 92 S.Ct. 349 (1971) (internal citations omitted). In deciding whether to provide retrospective application, the Court "must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Chevron Oil Company v. Huson at 404 U.S. at 106-107 *quoting* Linkletter v. Walker, 381 U.S. 618, 629, 85 S.Ct. 1731, 1738, (1965). Finally, the Court must weigh the inequity imposed by retroactive application where a decision could produce substantial inequitable results if applied retroactively within the standard of avoiding the injustice or hardship by a holding of nonretroactivity. Chevron v. Huson, 404 U.S. at 107, *quoting* Cipriano v. City of Houma, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900 (1969).

In Giacumbo, the appellant, a former local president was expelled from the IBT for, inter alia, breaching his financial duties by embezzling and converting funds. In reversing the decision of the district court, the Court of

Appeals held that their review de novo of Review Board actions shall apply the same standard of review applicable to review of final federal agency action under the Administrative Procedure Act, to "review the record to determine whether the agency considered the relevant factors and acted within its discretion." United States v. IBT (Giacumbo), 170 F.3d at 142 *citing* Aquarius Marine Co. v. Pena, 64 F.3d 82, 87 (2d Cir., 1995).

Under the circumstances of the instant matter, where the district court summarily approved the Review Board's decision to expel Petitioner from the IBT, and the Court of Appeals as the initial reviewing court failed to apply the substantial evidence rule to the decision below, Petitioner contends that retrospective application of the decision in United States v. IBT (Giacumbo) is appropriate in this matter.

As a result of the foregoing, Petitioner respectfully requests that this Court grant the instant Petition.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Dated: June 14, 1999

Respectfully submitted,

JESSE S. DRUCKER
Counsel of Record
3380 Veterans Mem. Hwy.
Bohemia, New York 11716
(516) 737-3330

Attorney for Petitioner

(2)

Supreme Court, U.S.
L A D

No. 99 346 JUN 15 1999

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

GLENN BOGGIA,

Petitioner,

v.

UNITED STATES OF AMERICA,
CHARLES M. CARBERRY, Chief Investigator,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

JESSE S. DRUCKER
Counsel of Record
3380 Veterans Memorial Hwy.
Bohemia, New York 11716
(516) 737-3330

Attorney for Petitioner

4SR

TABLE OF CONTENTS

Page

Order of United States District Court
Dated April 15, 1998. 1

Order and Decision of the Court of Appeals for the
Second Circuit Filed February 4, 1999. 2

United States v. IBT (Giacumbo), 170 F.3d 136
(2d Cir., 1999). 21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.

Defendant.

---

88 Civ. 4486 (DNE)

ORDER

U.S. DISTRICT COURT
FILED APRIL 15, 1998
S.D. OF N.Y.

IN RE: APPLICATION LVI OF THE INDEPENDENT REVIEW BOARD

IT IS HEREBY ORDERED that the IRB's determination of December 17, 1997, finding that the IBT decision of September 23, 1991, was not inadequate, is hereby made an Order of this Court.

SO ORDERED.

Dated: New York, New York
April 15, 1998

/S

Hon. David N. Edelstein, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of February, one thousand nine hundred and ninety-nine.

Present: Hon. Amalya L. Kearse
Hen. Chester Straub
Circuit Judges.
Hon. J. Garvan Murtha*
District Judge.

Docket No. 98-6106

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

CHARLES M. CARBERRY, Chief Investigator,

Appellee,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, COMMISSION OF LA COSA NOSTRA, ANTHONY SALERNO, a/k/a Fat Tony, MATTHEW IANNIELLO, a/k/a Matty the Horse, ANTHONY PROVENZANO, a/k/a Tony Pro, NUNZIO PROVENZANO, a/k/a Nunzi Pro, ANTHONY CORALLO, a/k/a Tony Ducks, SALVATORE SANTORO, a/k/a Tom Mix. CHRISTOPHER FURNARI, SR., a/k/a Christie Tick, FRANK MANZO, CARMINE PERSICO, a/k/a Junior, a/k/a The Snake, GENNARO LANGELLA, a/k/a Gerry Lang, PHILIP RASTELLI, a/k/a Rusty, NICHOLAS MARANGELLO, a/k/a Nicky Glasses, JOSEPH MASSING, a/k/a Joey Messina, ANTHONY FICAROTTA, a/k/a Figgy, EUGENE BOFFA, SR., FRANCIS SHEERAN, MILTON

ROCKMAN, a/k/a Maishe, JOHN TRONOLONE, a/k/a Peanuts, JOSEPH JOHN AIUPPA, a/k/a Joey O'Brien, a/k/a Joe Doves, a/k/a Joey Aiuppa, JOHN PHILIP CERONE, a/k/a Jackie the Lackie, a/k/a Jackie Cerone, JOSEPH LOMBARDO, a/k/a Joey the Clown, ANGELO LAPIETRA, a/k/a as Nutcracker, FRANK BALISTRIERI, a/k/a as Mr. B, CARL ANGELO DELUNA, a/k/a as Toughy, CARL CIVELLA, a/k/a Corky, ANTHONY THOMAS CIVELLA, a/k/a Tony Ripe, GENERAL EXECUTIVE BOARD, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JACKIE PRESSER, General President, JOSEPH TREROTOLA, a/k/a Joe T, First Vice President, ROBERT HOLMES, SR., Second Vice President, WILLIAM J. McCARTHY, Third Vice President, JOSEPH W. MORGAN, Fourth Vice President, EDWARD M. LAWSON, Fifth Vice President, ARNOLD WEINMEISTER. Sixth Vice, MAURICE R. SCHURR, Eighth Vice President, DONALD PETERS, Ninth Vice President, WALTER J. SHEA, Eighth Vice President, HAROL) FRIEDMAN, Eleventh Vice President, JACK D. COX Twelfth Vice President, DON L. WEST, Thirteenth Vice President, MICHAEL J. RILEY, Fourteenth Vice President, THEODORE COZZA, Fifteenth Vice President, DANIEL LIGUROTIS, Seventeenth Vice President, SALVATORE PROVENZANO, a/k/a Sammy Pro, Former Vice President, WELDON MATHIS, General Secretary-Treasurer; JOHN H. CLEVELAND, Seventh Vice President,

Defendants,

GLENN BOGGIA,

Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

CAROLYN CLARK CAMPBELL, Clerk

U.S.C.A.
Filed April 15, 1999
SECOND CIRCUIT

By:
/s
Beth J. Measor
Administrative Attorney

*The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

167 F.3d 113
160 L.R.R.M. (BNA) 2385, 137 Lab.Cas. P 10,353
(Cite as: 167 F.3d 113)

**UNITED STATES of America, Plaintiff-Appellee,
Charles M. Carberry, Chief Investigator, Appellee,
International Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers Of
America, AFL-CIO, Commission of La Cosa Nostra, Anthony
Salerno, a/k/a Fat
Tony, Matthew Ianniello, a/k/a Matty the Horse, Anthony
Provenzano, a/k/a Tony
Pro, Nunzio Provenzano, a/k/a Nunzi Pro, Anthony Corallo,
a/k/a Tony Ducks,
Salvatore Santoro, a/k/a Tom Mix, Christopher Furnari, Sr.,
a/k/a Christie
Tick, Frank Manzo, Carmine Persico, a/k/a Junior, a/k/a The
Snake, Gennaro
Langella, a/k/a Gerry Lang, Philip Rastelli, a/k/a Rusty,
Nicholas Marangello,
a/k/a Nicky Glasses, Joseph Massino, a/k/a Joey Messina,
Anthony Ficarotta,
a/k/a Figgy, Eugene Boffa, Sr., Francis Sheeran, Milton
Rockman, a/k/a Maishe,
John Tronolone, a/k/a Peanuts, JOSEPH John Aiuppa, a/k/a
Joey O'Brien, a/k/a
Joe Doves, a/k/a Joey Aiuppa, John Philip Cerone, a/k/a
Jackie the Lackie,
a/k/a Jackie Cerone, Joseph Lombardo, a/k/a Joey the Clown,
Angelo LaPietra,
a/k/a Nutcracker, Frank Balistrieri, a/k/a Mr. B, Carl Angelo
DeLuna, a/k/a
Toughy, Carl Civella, a/k/a Corky, Anthony Thomas Civella,
a/k/a Tony Ripe,
General Executive Board, International Brotherhood of
Teamsters, Chauffeurs,
Warehousemen and Helpers of America, Jackie Presser,
General President, Joseph
Trerotola, a/k/a Joe T, First Vice President, Robert Holmes,**

Sr., Second Vice President, William J. McCarthy, Third Vice President, Joseph W. Morgan, Fourth Vice President, Edward M. Lawson, Fifth Vice President, Arnold Weinmeister, Sixth Vice President, Maurice R. Schurr, Eighth Vice President, Donald Peters, Ninth Vice President, Walter J. Shea, Tenth Vice President, Harold Friedman, Eleventh Vice President, Jack D. Cox, Twelfth Vice President, Don L. West, Thirteenth Vice President, Michael J. Riley, Fourteenth Vice President, Theodore Cozza, Fifteenth Vice President, Daniel Ligurotis, Sixteenth Vice President, Salvatore Provenzano, a/k/a Sammy Pro, Former Vice President, Weldon Mathis, General Secretary-Treasurer, John H. Cleveland, Seventh Vice President,
Defendants,
v.
Glenn BOGGIA, Appellant.

Docket No. 98-6106.

United States Court of Appeals,
Second Circuit.

Argued Dec. 10, 1998.

Decided Feb. 4, 1999.

In disciplinary proceedings conducted pursuant to procedures established by consent decree entered into in settlement of civil racketeering charges brought by government against union, Independent Review Board (IRB) sought order affirming its decision to permanently expel union official from union for demanding and accepting bribe. The United States District Court for the Southern District of New York, David N. Edelstein, J.,

upheld decision. Official appealed. The Court of Appeals, Kearse, Circuit Judge, held that: (1) member was not entitled to counsel before disciplinary panel; (2) member was not improperly denied opportunity to cross-examine Federal Bureau of Investigation (FBI) agent whose recorded conversation was offered as evidence of bribery; (3) union's general president was not disqualified from reviewing second disciplinary panel's recommendation; (4) finding that member committed bribery was supported by sufficient evidence; and (5) decision to impose penalty of expulsion was not arbitrary and capricious.

Affirmed.

[1] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Union member was not entitled to counsel before disciplinary panel in proceedings conducted pursuant to procedures established by consent decree entered into in settlement of civil racketeering charges brought by government against union; neither LMRDA, nor union's constitution, nor consent decree provided that member was entitled to assistance of counsel, and charging party did not have counsel present. Labor-Management Reporting and Disclosure Act of 1959, § 2 et seq., 29 U.S.C.A. § 401 et seq.

[2] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
In disciplinary proceedings conducted pursuant to consent decree settling civil racketeering charges brought by government against union, union member was not improperly denied the opportunity to cross-examine Federal Bureau of Investigation (FBI) agent whose recorded conversation was offered as evidence of bribery; member did not dispute that recorded conversation took place, member's defense did not depend on any testimony from agent, and agent's recorded statements were corroborated by member's responses.

[3] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6

Evidentiary rules are relaxed in disciplinary proceedings conducted pursuant to consent decree settling civil racketeering charges brought by government against union, and hearsay, so long as it is accompanied by sufficient indicia of reliability, is admissible.

[4] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
In disciplinary proceedings conducted pursuant to consent decree settling civil racketeering charges brought by government against union, hearsay evidence may be considered particularly reliable when corroborated by non-hearsay statements or by reliable independent sources, or when the hearsay declarant could face criminal sanctions for making false statements to Federal Bureau of Investigation (FBI).

[5] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Fact that the declarant participated in events pursuant to cooperation agreement with government does not give rise to any presumption that his or her statements regarding event are unreliable in disciplinary proceedings conducted pursuant to consent decree settling civil racketeering charges brought by government against union.

[6] LABOR RELATIONS k109
232Ak109
That union president had reviewed decision of first panel that had recommended union member's expulsion for bribery did not disqualify him, under LMRDA's "full and fair hearing" provision, from reviewing same recommendation by second panel. Labor-Management Reporting and Disclosure Act of 1959, § 101(a)(5), 29 U.S.C.A. § 411(a)(5).

[7] LABOR RELATIONS k109
232Ak109
Union member may not, consistent with LMRDA's "full and fair hearing" provision, be retried before a panel that includes one or more persons who previously heard the identical charges and

found member guilty. Labor- Management Reporting and Disclosure Act of 1959, § 101(a)(5), 29 U.S.C.A. § 411(a)(5).

[8] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Under any arguably applicable standard of review, finding that union member committed bribery was supported by sufficient evidence in disciplinary proceedings conducted pursuant to consent decree settling civil racketeering charges brought by government against union.

[9] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Decision to expel member from union for accepting bribe in return for assurances of labor peace on job site was not arbitrary or capricious in disciplinary proceedings conducted pursuant to consent decree settling civil racketeering charges brought by government against union; union's constitution permitted expulsion, and disciplinary panel gave reasoned explanation for distinguishing each of the cases called to its attention and advanced sound basis for imposing the most severe sanction. Labor-Management Reporting and Disclosure Act of 1959, § 101(a)(5), 29 U.S.C.A. § 411(a)(5).

[10] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
District court applies arbitrary and capricious standard to review of penalties imposed in disciplinary proceedings conducted pursuant to consent decree settling civil racketeering charges brought by government against union, and on appeal Court of Appeals will not overturn such penalty unless it finds it unwarranted in law or in fact.

[10] FEDERAL COURTS k813
170Bk813
District court applies arbitrary and capricious standard to review of penalties imposed in disciplinary proceedings conducted pursuant to consent decree settling civil racketeering charges brought by government against union, and on appeal Court of

Appeals will not overturn such penalty unless it finds it unwarranted in law or in fact.

***115** Andrew W. Schilling, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney for the Southern District of New York, Gideon A. Schor, Assistant United States Attorney, New York, New York, on the brief), for Plaintiff-Appellee United States of America.

Dennis E. Milton, New York, New York (Charles M. Carberry, Chief Investigator, Jones Day Reavis & Pogue, New York, New York, on the brief), for Appellee Charles M. Carberry.

Robert A. Culp, New York, New York (Law Offices Laura A. Brevetti, New York, New York, on the brief), for Appellant.

Before: KEARSE and STRAUB, Circuit Judges, and MURTHA, Chief District Judge. [FN*]

> FN* Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

KEARSE, Circuit Judge:

Glenn Boggia appeals from an order of the United States District Court for the Southern District of New York, David N. Edelstein, Judge, adopting a determination of the Independent Review Board ("IRB") for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL- CIO ("IBT" or the "Union"), which upheld an IBT decision permanently expelling Boggia from Union membership and barring him from receiving compensation or nonvested benefits from any IBT affiliate on the ground that he had brought the Union into disrepute by accepting a bribe in exchange for promising labor peace. On appeal, Boggia contends that the Union's hearing procedures were unfair, that the evidence was insufficient to support the finding that he accepted a bribe, and that the sanction of permanent expulsion was unduly severe.

Finding no merit in his contentions, we affirm.

I. BACKGROUND

This appeal arises out of IBT disciplinary proceedings conducted pursuant to procedures established by the 1989 consent decree entered into in settlement of civil racketeering charges brought by the government against the IBT in connection with the Union's long history of corruption and involvement with organized crime (the "Consent Decree"), see, e.g., United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO ("Election Rules Order"), 931 F.2d 177, 180-81 (2d Cir.1991); United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO ("Friedman & Hughes"), 905 F.2d 610, 612-13 (2d Cir.1990), as those procedures have been amended, see, e.g., United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO ("IBT Rules"), 803 F.Supp. 761, 802- 05 (S.D.N.Y.1992), aff'd in part and rev'd in part, 998 F.2d 1101, 1107-11 (2d Cir.1993), on remand, 829 F.Supp. 602, 605-08 (S.D.N.Y.1993), familiarity with which is assumed.

A. The Proceedings Against Boggia

Boggia had been a member of IBT Local 282 since 1974 and had frequently been an "On-site Steward" since 1976. In March ***116** 1996, the Corruption Officer of Local 282 sent the IRB a letter, reporting that he had received information from the Federal Bureau of Investigation ("FBI") that Boggia had participated in a payoff scheme in which he demanded $1,250 from a person who was an FBI informant. The letter stated that the bribe had been witnessed by an FBI agent and captured on audio tape.

In August 1996, the IRB submitted a detailed Investigative Report on these allegations ("IRB Report" or "Report") to the Trustee for Local 282 ("Trustee" or "Local 282 Trustee"). According to the Report, on April 7, 1992, an FBI informant operating under the alias "Frank Falco" was posing as a company

representative for a construction site in Queens, New York. On that morning, FBI agents gave him, inter alia, an envelope containing $1,250 in cash and concealed a tape-recording device on his person. Thereafter, observed by an FBI agent, Falco proceeded to meet with Boggia in the parking lot of a restaurant. During the tape-recorded conversation, Falco gave Boggia the envelope containing the $1,250 in exchange for which Boggia promised to prevent labor disruptions on Falco's construction job. Attached to the IRB Report were the FBI tape and a transcript of the tape.

The Report also stated that "[t]he position of On-site Steward has been dominated by organized crime for decades." (IRB Report at 2 n. 3) (citing, inter alia, a 1987 New York State Organized Crime Task Force interim report, see id., as well as information obtained in 1991 from "self-admitted organized crime member Salvatore Gravano," id. n. 2, who had become a cooperating witness in 1991 and detailed for the FBI "the historic manipulation of Local 282 On-site Stewards by the Gambino La Cosa Nostra family," id. n. 3). Boggia had been appointed to his On-site Steward position by former Local 282 officer Robert Sasso, who later permanently resigned from IBT membership in order to settle charges that he knowingly associated with members of organized crime, including Gravano. The IRB Report recommended that the Trustee bring disciplinary charges against Boggia.

The Trustee lodged the recommended charges and requested that Boggia be permanently expelled from the Union. A panel was promptly appointed by IBT General President Ron Carey to hear the evidence, make findings, and recommend a resolution. That panel ("First Panel") conducted hearings in November 1996, found Boggia to have accepted a bribe, and recommended his expulsion. The First Panel's decision, however, was overturned by the IRB, which ruled that Boggia had not been provided with certain documents sufficiently in advance of his hearing. Carey thereafter appointed a new panel, composed entirely of new members, to hear the charges ("Second Panel" or "Panel").

The Second Panel conducted hearings in June 1997. The case

against Boggia was presented by the Local 282 Trustee, who introduced the IRB Report and its accompanying exhibits, which included the tape transcript and the tape. Boggia appeared on his own behalf and was assisted in his defense by another IBT member. Boggia argued principally that, though he had met with Falco and made the statements captured on tape, he had in fact refused to accept the proffered bribe. He asserted that someone had alerted him that he was to be "set up" and that he had played along with the conversation merely to conduct his own investigation of the set-up. He also called several witnesses to testify to his good character. Boggia further argued that even if the evidence showed that he had accepted a bribe, the proposed penalty of permanent expulsion was too severe. He presented evidence of other malfeasances that had led to lesser penalties.

B. The Second Panel's Findings and Recommendation for Expulsion

In a decision entitled Findings and Recommendations of Hearing Panel, issued in September 1997 ("Second Panel Findings"), the Second Panel found that the reliable evidence, including the FBI tape of the conversation between Boggia and Falco, "clearly establishes that Boggia did in fact accept the bribe from Falco." (Second Panel Findings at 4.) The Second Panel noted that

> ***117** [t]he entire conversation between Boggia and Falco was recorded on the miniature tape recorder that Falco had on his person. Trustee Exhibit A-14. The tape recording establishes that upon meeting Boggia on the morning of April 7, Falco handed, and Boggia accepted, an envelope containing $1,250. Id. Upon handing the money to Boggia, Falco stated "Twelve hundred fifty dollars, now you don't give me no more trouble on the job." Id. Boggia responded "No." Id. Thereafter, Falco stated "Before the job finish I give you another twelve fifty, that's it, that's the best I can do. So you happy?" Boggia responded "Sure." Id.

(Id. at 3-4.) Falco then proceeded to seek "assurances from Boggia that the 'company' w[ould] not have problems with" a minority hiring "coalition," and "Boggia assured Falco that any such problems would be 'take[n] care of'." (Id. at 4.) The Second

Panel rejected as not credible Boggia's assertion that he had not in fact accepted the proffered bribe:

> First, Boggia acknowledged in the hearing that he met with an individual who he understood to be Frank Falco at the Hilltop Diner in Queens, New York on April 7, 1992. Transcript, pp. 51-52. Boggia also acknowledged at the hearing that it was in fact his voice on the tape recording. Id.
>
> Second, the tape recording clearly demonstrates that Boggia accepted an envelope containing $1,250 from Falco in the parking lot of the Hilltop Diner. Indeed, the following colloquy supports this conclusion:
>
> Falco: (UI) twelve hundred fifty dollars. Now, you don't give me no more trouble on the job.
>
> Boggia: No.
>
> Falco: All right, let me (UI), before the job finish I give to you another twelve fifty, that's it, that's the best I can do. So you happy?
>
> Boggia: Sure
>
> . . . . .
>
> Falco: Comfortable. Count the money (UI).
>
> Boggia: I take your word for it.

(Id. at 5.) The Panel also rejected Boggia's claim that he had merely been conducting his own investigation of Falco. It pointed out, inter alia, that Boggia had given no credible explanation for his purported "sting" operation and had never reported Falco's actions to any governmental authorities.

The Panel recommended that Boggia be permanently expelled from membership in the IBT and barred for life from employment with the IBT or any of its affiliates. The Panel rejected Boggia's contention that permanent expulsion was a disproportionately severe penalty. It found that the prior cases relied on by Boggia, in which lesser sanctions had been imposed, were distinguishable. Only one of the cases, to wit, In re Mario Perrucci, concerned bribery by a union representative. In that case the union official had purchased a boat from an employer of his members for substantially less than its fair market value, thereby essentially accepting a thing of value from an employer; the penalty imposed

was a permanent ban on holding Union office and a 10-year expulsion from membership. The Panel noted, however, that there was no evidence in that case that the union official had demanded the bargain price in exchange for "labor peace":

> The Panel finds that the charge against Boggia in this matter is even more egregious than the charge against Perrucci because in this case there was a quid pro quo, i.e. the payment of money in exchange for securing labor peace. We are not aware of any evidence in the Perrucci case which linked the purchase of the boat to any concessions by the union. As a result, the Perrucci case is readily distinguishable from the facts in this case, and the penalty imposed against Perrucci would not be sufficient in this case.

(Second Panel Findings at 9.) The Panel concluded that Boggia's offense warranted lifetime expulsion from membership.

IBT General President Carey accepted the Second Panel's findings and recommendation. After summarizing the evidence and the findings, and noting his agreement, the General President ordered as follows:

> ***118** Glenn Boggia is permanently expelled from membership in any IBT affiliate, barred from employment by any IBT affiliate, including consulting work, and barred from receiving any compensation or benefits from any IBT affiliate, except for fully vested pension benefits.

(Decision of the General President dated September 23, 1997, at 2.) This decision was upheld on review by the IRB, which subsequently sought and obtained in the district court an order affirming the decision. This appeal followed.

II. DISCUSSION

On appeal, Boggia makes challenges to the hearing procedures, the sufficiency of the evidence, and the severity of the penalty. Finding no merit in his contentions, we affirm.

A. The Procedural Contentions

Boggia's principal procedural claims are that he was subjected to

a "discriminatory" denial of the right to counsel, that he was prevented from cross-examining Falco, and that the Second Panel's ruling should have been reviewed by a Union official other than Carey. These contentions lack merit.

[1] Neither the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 et seq. (1994) ("LMRDA"), nor the IBT Constitution, nor the Consent Decree provides that a member is entitled to the assistance of counsel at a disciplinary hearing. Indeed, although Boggia complained to the Panel that barring his counsel from the hearing was unfair, he does not contend on this appeal that he had a right to have counsel present. Rather, he cites to a provision of the IBT Constitution that bars the "charging party" from receiving assistance of counsel in the presentation of evidence in support of the charges, see IBT Constitution art. XIX, § 1(c); and he argues that he was the victim of a "discriminatory" deprivation of counsel because at his hearing the charging party was so assisted. This contention is meritless.

The charging party here was the Local 282 Trustee. The record does not indicate that the Trustee was assisted by counsel at the hearing. The only person present in the capacity of counsel was counsel to the Panel, who advised the Panel as to appropriate evidentiary rulings. Other than the Trustee, Boggia, the Panel members, counsel to the Panel, and three witnesses, the only persons present were the Local 282 Corruption Officer, who had initiated the charges, and the Local 282 Corruption Counsel, Hon. Milton Mollen. At the outset of the hearing, the Panel's chairman stated that the Corruption Officer and Judge Mollen were present solely to observe and not to represent anyone. Boggia did not dispute that statement or otherwise suggest that any person in attendance was there in the capacity of counsel to assist the Local 282 Trustee. Boggia was permitted to consult counsel before the hearing; and, as required by the IBT Constitution, he was permitted to represent himself and to be accompanied and assisted at the hearing by an IBT member. We see nothing improper in this procedure.

[2] Boggia's contention that he was improperly denied the

opportunity to cross-examine Falco, whose tape-recorded statements were hearsay, is meritless for several reasons. First, Boggia did not dispute that the recorded conversation with Falco took place and that the voice attributed to him was in fact his. Further, Boggia's defense was that he was engaged in a "sting" of his own to explore the FBI's "sting." That defense did not depend on any testimony from Falco.

[3][4][5] Moreover, in IBT disciplinary hearings, evidentiary rules are relaxed, and hearsay--so long as it is accompanied by sufficient indicia of reliability--is admissible. See, e.g., United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL- CIO ("DiGirlamo"), 19 F.3d 816, 823 (2d Cir.), cert. denied, 513 U.S. 873, 115 S.Ct. 199, 130 L.Ed.2d 130 (1994); United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL- CIO ("Cimino"), 964 F.2d 1308, 1312 (2d Cir.1992). Hearsay evidence may be considered particularly reliable when corroborated by non-hearsay statements or by reliable independent sources, see DiGirlamo, ***119** 19 F.3d at 823-24, or when the hearsay declarant could face criminal sanctions for making false statements to the FBI, see United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO ("Adelstein"), 998 F.2d 120, 125 (2d Cir.1993); Cimino, 964 F.2d at 1313. The fact that the declarant participated in the events pursuant to a cooperation agreement with the government does not give rise to any presumption that his statements are unreliable. See Cimino, 964 F.2d at 1312. Within this framework, Falco's recorded statements were corroborated by, inter alia, Boggia's responses and were plainly admissible.

Finally, Boggia's own statements were not hearsay, and his own words were the most damning evidence against him. His contention that he rejected the bribe and that no money ever changed hands was belied by, for example, his response to Falco's question as to whether he was happy with the $1,250 as the first of two such payments ("Sure."), and his response to Falco's suggestion that Boggia count the money ("I take your word for

it.").

[6][7] Boggia's complaint that Carey should have been disqualified from reviewing the Second Panel's recommendation is similarly unfounded. Although a union member may not, consistent with the LMRDA's "full and fair hearing" provision, see 29 U.S.C. § 411(a)(5), be retried before a panel that includes one or more persons who previously heard the identical charges and found him guilty, see, e.g., Feltington v. Moving Picture Machine Operators Union Local 306 of I.A.T.S.E., 605 F.2d 1251, 1256-57 (2d Cir.1979), cert. denied, 446 U.S. 943, 100 S.Ct. 2169, 64 L.Ed.2d 799 (1980); Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, I.L.G.W.U., 605 F.2d 1228, 1242-43 (2d Cir.1979), cert. denied, 446 U.S. 919, 100 S.Ct. 1853, 64 L.Ed.2d 273 (1980), we have never extended this right to include the right to a different reviewing entity, see generally Feltington v. Moving Picture Machine Operators Union Local 306 of I.A.T.S.E., 605 F.2d at 1254-55, and we decline to do so here.

Here, Boggia was afforded a new hearing before the Second Panel, whose members did not include any members of the First Panel. There was no requirement that Carey, who had reviewed the decision of the First Panel, be replaced by a new reviewer following the decision of the Second Panel. Nor has Boggia provided anything more than conclusory assertions as to his view that Carey was biased against him or was otherwise unfit to be a reviewing officer. Carey's role provides Boggia no basis for relief.

Finally, although Boggia also complains that various of his prehearing discovery demands were not met, the IBT responded to those demands by stating that it possessed no materials other than those already given him. Boggia conceded at the hearing that he had no knowledge of the existence of other materials. The record does not reveal any violation of any discovery obligation that may have been imposed by the IBT Constitution, the Rules and Procedures of the IRB, or other internal Union rule.

In sum, we see no violation of any of Boggia's procedural rights.

B. The Sufficiency Challenge

[8] Nor is there merit in Boggia's challenge to the sufficiency of the evidence. We have previously noted that "the Consent Decree contains an extremely deferential standard of review of decisions of the IRB by the district court," but in each of the matters to come before us we have found it unnecessary to define the precise standard of review to be applied on appeal because in each case we have concluded "that the district court's order should be affirmed under any arguably applicable standard of review." United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO ("Simpson"), 120 F.3d 341, 346 (2d Cir.1997) (internal quotation marks omitted) (citing cases); see, e.g., United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO ("Sansone"), 981 F.2d 1362, 1368 (2d Cir.1992) (citing cases).

We see no greater need to define a precise standard of appellate review in this case. ***120** The evidence described in Part I above was ample to support a finding of Boggia's guilt under any arguably applicable standard.

C. The Challenge to the Sanctions

[9][10] Nor are we persuaded by Boggia's contention that the sanctions imposed are unduly harsh. Expulsion from union membership, though a drastic sanction, is permissible under the LMRDA if the union's constitution so provides. See 29 U.S.C. § 411(a)(5). There is no dispute that the IBT Constitution provides that a member may be stripped of membership rights if found guilty of misconduct. The district court reviews penalties imposed by the IBT in accordance with the Consent Decree under an "arbitrary and capricious" standard, see, e.g., Simpson, 120 F.3d at 348; United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO ("Wilson"), 978 F.2d 68, 73 (2d Cir.1992), and on appeal this Court will not overturn such a penalty unless we find it unwarranted in law or in fact, see, e.g., Simpson, 120 F.3d at 348;

Wilson, 978 F.2d at 73.

The record in the present case plainly justified the findings that Boggia had demanded and accepted a bribe, and that he had done so in exchange for promising labor peace. The Second Panel considered the arguments and evidence presented by Boggia in support of the imposition of a less severe penalty. As described in Part I.B. above, the Panel gave a reasoned explanation for distinguishing each of the cases called to its attention and advanced a sound basis for imposing the most severe sanction on Boggia. We see no arbitrariness or caprice in the decision at issue here.

CONCLUSION

We have considered all of Boggia's contentions in this appeal and have found them to be without merit. The order of the district court is affirmed.

170 F.3d 136
160 L.R.R.M. (BNA) 2587
(Cite as: 170 F.3d 136)

**UNITED STATES of America
and Charles M. Carberry, Independent Review Board
Chief Investigator, Plaintiffs-Appellees,
v.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
et al., Defendants,
Gene Giacumbo, Respondent-Appellant.**

No. 97-6212.

United States Court of Appeals,
Second Circuit.

Argued April 20, 1998.

Decided March 2, 1999.

Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), sought approval of decision that former president of local union had violated fiduciary duty to union. Following remands for reconsideration of sanctions, 1996 WL 785509 and 951 F.Supp. 1113, the United States District Court for the Southern District of New York, David N. Edelstein, J., affirmed order finding that former president violated consent decree and recommending that he be barred for life from union membership, and denied former president's motion for hearing on issue of IRB member's refusal to recuse himself. Former president appealed. The Court of Appeals, Walker, Circuit Judge, held that: (1) as matter of first impression, review of IRB decision would be the same as review of determination of administrative agency; (2) imposition of lifetime ban was arbitrary and capricious; and (3) standard for determining whether IRB member should have recused himself was that of "evident partiality."

Vacated and remanded.

Jacobs, Circuit Judge, concurred and filed opinion.

[1] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
District court should not be accorded any greater deference in its review of decisions of Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), than it would be accorded when it reviews agency actions under Administrative Procedure Act (APA). 18 U.S.C.A. § 1961 et seq.; 5 U.S.C.A. § 551 et seq.

[2] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
District court is required to treat decisions of Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), with great deference, and is not entitled to make independent factual findings, but is limited to the record before it. 18 U.S.C.A. § 1961 et seq.

[3] ADMINISTRATIVE LAW AND PROCEDURE k683
15Ak683
When considering a district court's review of an agency action, Court of Appeals gives no deference to the lower court but reviews de novo whether the agency action satisfies the standards of the Administrative Procedure Act (APA). 5 U.S.C.A. § 551 et seq.

[4] ADMINISTRATIVE LAW AND PROCEDURE k683
15Ak683
When considering a district court's review of an agency action, Court of Appeals, like the district court, reviews the record to determine whether the agency considered the relevant factors and acted within its discretion. 5 U.S.C.A. § 551 et seq.

[5] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Review by Court of Appeals of sanctions determined by Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), must, like that of district court, be of a narrow scope, because this is an area where the IRB has been given wide discretion. 18 U.S.C.A. § 1961 et seq.

[6] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Findings of facts by Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), are reviewed by Court of Appeals for substantial evidence on the whole record, and the substantial evidence test is deferential. 18 U.S.C.A. § 1961 et seq.

[7] ADMINISTRATIVE LAW AND PROCEDURE k791
15Ak791
"Substantial evidence," by which agency's factual findings must be supported, is more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
See publication Words and Phrases for other judicial constructions and definitions.

[8] ADMINISTRATIVE LAW AND PROCEDURE k789
15Ak789
Assuming that agency's findings of fact are supported by substantial evidence, inferences based on those findings are discretionary and can only be disturbed if they are arbitrary and capricious.

[9] ADMINISTRATIVE LAW AND PROCEDURE k789
15Ak789
When reviewing inferences drawn by agency, Court of Appeals is obliged to guard against an agency drawing inferences that are

arbitrary in relation to the facts found, no matter how substantial may be the support for those facts.

[10] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
In review of sanctions determined by Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), Court of Appeals' inquiry is limited to whether the IRB made an allowable judgment in its choice of the remedy. 18 U.S.C.A. § 1961 et seq.

[11] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Court of Appeals may only set aside choice of sanctions made by Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), where the sanctions are unwarranted in law or without justification in fact. 18 U.S.C.A. § 1961 et seq.

[12] ADMINISTRATIVE LAW AND PROCEDURE k758
15Ak758
Agency's imposing of sanction based on an improper understanding of the law is always an abuse of discretion, rendering the sanction arbitrary and capricious and therefore impermissible, and this is true even though the agency permissibly could have imposed that very same sanction if it had done so.

[13] ADMINISTRATIVE LAW AND PROCEDURE k758
15Ak758
If agency imposes a sanction as a result of an exercise of discretion that is impermissibly limited as a result of a mistaken view by the agency as to the scope of its discretion or an impermissible narrowing of the agency's discretion by the district court, there has been a misunderstanding of law and the sanction must be vacated as arbitrary and capricious.

[13] ADMINISTRATIVE LAW AND PROCEDURE k763
15Ak763
If agency imposes a sanction as a result of an exercise of discretion that is impermissibly limited as a result of a mistaken view by the agency as to the scope of its discretion or an impermissible narrowing of the agency's discretion by the district court, there has been a misunderstanding of law and the sanction must be vacated as arbitrary and capricious.

[14] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Inference by Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union, that former local union president violated his suspension from union based on his presence in certain city during union convention when he met with at least one union official, and his ongoing contacts with a union official, was arbitrary and capricious; former president was under no prohibition from associating with union members or officers or from being in city during convention.

[15] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Imposition by Independent Review Board (IRB) of lifetime ban from union membership on former local union president, as sanction for, inter alia, violating financial control provisions of union bylaws, was arbitrary and capricious, inasmuch as a progression of district court reviews misled IRB into believing that it had to impose sanctions within a narrower and stricter range than it was permitted and obliged to consider.

[16] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
District court erred when, without considering the merits of the case, it vacated imposition of sanctions on former local union president by Independent Review Board (IRB), based on its determination that sanctions imposed were not commensurate with severity of charges levelled.

[17] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
District court can sustain sanctions determination by Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), only after a merits review. 18 U.S.C.A. § 1961 et seq.

[18] ADMINISTRATIVE LAW AND PROCEDURE k763
15Ak763
Uneven application of sanctions by agency does not normally render a sanction imposed in a particular case arbitrary and capricious.

[19] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), should have wide discretion in choosing if and how to censure actions that normally benefit the union, but which are improperly motivated. 18 U.S.C.A. § 1961 et seq.

[20] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Independent Review Board (IRB) did not act arbitrarily and capriciously in imposing six-month membership suspension, or in subsequently upon remand imposing three-year membership suspension, against former union president upon determining that he had, inter alia, violated financial control provisions of union bylaws by charging personal expenses on union credit card.

[21] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
District court exceeded its appellate role when, on its second remand to Independent Review Board (IRB) of sanctions imposed on former local union president, it suggested specific sanctions to the IRB.

[22] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), is permitted to consider conduct subsequent to the imposition of sanctions in reimposing sanctions following remand. 18 U.S.C.A. § 1961 et seq.

[23] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Whether the correct recusal standard was employed by Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union under Racketeer Influenced and Corrupt Organizations Act (RICO), was a question of law which Court of Appeals would review de novo. 18 U.S.C.A. § 1961 et seq.

[24] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Standard for determining whether member of Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union, should recuse himself or herself is "evident partiality" standard, not "involved officer or member" or "appearance of partiality" standard. 9 U.S.C.A. § 10(a)(2); 28 U.S.C.A. § 455(a).

[25] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
"Evident partiality" standard, applicable to recusal decision by member of Independent Review Board (IRB), created pursuant to consent decree settling action between United States and union, is less strict than the "appearance of partiality" standard applicable to judges. 28 U.S.C.A. § 455(a).

[26] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Before recusal of member of Independent Review Board (IRB) is required under "evident partiality" standard, a party must

demonstrate that a reasonable person would have to conclude that the arbitrator was partial to one party to the arbitration; partiality need not be actually proven to be the basis for a reasonable conclusion of partiality, but it may not be based simply on speculation either.

[27] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Integral part of the reasonable person test, applicable to decision whether member of Independent Review Board (IRB) should recuse himself or herself, is an assessment of the facts established by the party alleging bias.

[28] FEDERAL CIVIL PROCEDURE k2397.6
170Ak2397.6
Under "evident partiality" standard for determining whether member of Independent Review Board (IRB) should recuse himself or herself, the bar the movant must clear is somewhat lower than actual partiality.
***139** J. Bruce Maffeo, Seiff & Kretz, New York, NY, for Respondent- Appellant.

Charles M. Carberry, Chief Investigator, Independent Review Board, New York, NY, (Bonnie L. Hemenway, Jones, Day, Reavis & Pogue, New York, NY; Celia A. Zahner, Special Counsel to Chief Investigator, New York, NY, of counsel), for Appellee Chief Investigator.

Beth E. Goldman, Assistant United States Attorney for the Southern District of New York, (Mary Jo White, United States Attorney and Steven M. Haber, Assistant United States Attorney, New York, NY, of counsel), for Plaintiff-Appellee United States.

Before: WALKER and JACOBS, Circuit Judges, and AMON, District Judge. [FN*]

> FN* The Honorable Carol B. Amon, of the United States District Court for the Eastern District of New York, sitting by designation.

*140 Judge JACOBS concurs in the opinion of the court and in a separate concurring opinion.

WALKER, Circuit Judge:

Gene Giacumbo appeals from the order of the United States District Court for the Southern District of New York (David N. Edelstein, District Judge), United States v. Int'l Bhd. of Teamsters, No. 88 Civ. 4486 (S.D.N.Y. July 28, 1997) ("Giacumbo III"), affirming the May 15, 1997 decision of the Independent Review Board ("IRB"), an investigative and disciplinary body established under the consent decree entered against the International Brotherhood of Teamsters ("IBT") in United States v. Int'l Bhd. of Teamsters, 88 Civ. 4486 (S.D.N.Y. Mar. 14, 1989) ("Consent Decree"). The IRB had found that Giacumbo violated the Consent Decree and recommended that he be barred for life from union membership and prohibited from receiving any direct or indirect payments from the IBT or its affiliates, except money accrued and benefits from employers resulting from collective bargaining agreements. The district court also upheld IRB member Lacey's determination not to recuse himself. Giacumbo now appeals.

This appeal is one in a long series of cases arising under the Consent Decree that resulted from a 1989 settlement of an action between the United States and the IBT brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964. We have summarized the history of the RICO action in several prior opinions, see, e.g., United States v. IBT ("Simpson"), 120 F.3d 341, 343 n. 1 (2d Cir.1997); United States v. IBT ("1991 Election Rules"), 931 F.2d 177, 180-81 (2d Cir.1991), and the district court has presented a detailed background of the facts leading up to this case, see United States v. IBT, 951 F.Supp. 1113, 1116-28 (S.D.N.Y.1997) ("Giacumbo II"). We assume familiarity with the foregoing renditions and will only briefly recapture their salient features.

As part of its efforts to root out organized crime from the IBT,

the United States filed a RICO action against the IBT, its General Executive Board, the eighteen board members, the Commission of La Cosa Nostra and individual members and associates of La Cosa Nostra. See 1991 Election Rules, 931 F.2d at 180. The government's allegations against the IBT, the IBT Board and the Board members were settled by the Consent Decree, which instituted sweeping reforms of the IBT's electoral and disciplinary processes, including the creation of the IRB to determine IBT disciplinary matters. See United States v. IBT ("IRB Appointee"), 12 F.3d 360, 362 (2d Cir.1993). The IRB consists of three members: one chosen by the Attorney General of the United States, one by the IBT, and a third chosen by the first two IRB designees or in the absence of their agreement, by the district court. The current IRB members are Grant Crandall, Frederick B. Lacey, and William H. Webster. The IRB has broad investigatory powers and the power to hold hearings in certain circumstances. If the IRB uncovers what it believes to be impermissible conduct within the IBT, it recommends that the IBT proceed against the alleged wrongdoers. The outcome of IBT disciplinary proceedings are subject to review by the IRB and, if the IBT fails to take appropriate measures, the IRB may act in its stead. IRB determinations, in turn, are reviewable by the district court.

Since this appeal raises questions in two separate areas, the IRB's sanctions against Giacumbo and IRB member Lacey's refusal to recuse himself, each will be dealt with in turn.

I. The Sanctions Against Giacumbo

Background

On March 20, 1995, the IRB issued an investigative report recommending that three charges be brought against Giacumbo, who was at the time an IBT Vice President and former President and principal officer of Local 843. The first alleged that Giacumbo violated the IBT Constitution and brought reproach upon the IBT by

> allow[ing] employees of Allways Travel, including a friend of [his], to join Local 843 without negotiating any collective

> bargaining ***141** agreement on their behalf, but in an effort to assist their employer to obtain the IBT travel contract and to allow such members to be eligible to vote for [him] in the 1992 Local 843 election....

The second alleged that Giacumbo brought reproach upon the IBT by "engag[ing] in a pattern of violating financial control provisions in the Local Bylaws, the IBT Secretary Treasurer's Manual and the IBT Constitution" inter alia by using a Union credit card for personal expenses, by using a single signature on several checks rather than the required dual signature, and by purchasing computer equipment without prior approval. The third charge alleged that Giacumbo violated the IBT constitution by "fail[ing] to return to the IBT $1,600 in monthly car allowances [he] received between February 1992 and May 1992 when the Local was also paying [his] car expenses thereby breaching [his] fiduciary duties and embezzling and converting $1,600 of IBT funds to [his] own use...."

The IRB heard the charges against Giacumbo on May 24, 1995, and on October 31, 1995, issued an opinion and order finding Giacumbo guilty as charged. The IRB ordered a sanction of a six month suspension from IBT membership to run concurrent with a six month suspension from his position in the union and a $1,600 fine ("Sanction I"). The IRB submitted its decision to the district court for review pursuant to the Rules and Procedures for Operation of the Independent Review Board for the IBT ("IRB Rules"). Without considering the merits, the district court noted the charges and summarily remanded to the IRB for reconsideration of the sanctions in light of the severity of the charges ("Remand I"). United States v. IBT, 910 F.Supp. 139 (S.D.N.Y.1996) ("Giacumbo I").

The IRB conducted a supplemental hearing on March 21, 1996. It found that Giacumbo had violated his suspension by attending a Local meeting for the nomination of delegates to the 1996 IBT International Convention and by allowing himself to be nominated. The IRB also found that because Gicaumbo failed to pay the $1,600 fine, he had shown disrespect for the sanctions and that the supplemental hearing "confirmed that [Giacumbo] sees

himself as above the rules." Opinion and Decision of the IRB at 3 (May 1, 1996).

In light of Remand I's directive to reconsider the sanctions and the additional findings made during the supplemental hearing, the IRB imposed sanctions of a three year suspension from IBT membership, prohibition from holding any position in the IBT or related entity during that period, and reaffirmed the $1,600 fine ("Sanction II"). The IRB again submitted its decision for review by the district court.

This time, the district court reviewed the merits and affirmed the IRB's findings and conclusions except for the general finding that Giacumbo "sees himself as above the rules." But the district court found the sanctions still too lenient and on January 9, 1997, again remanded the sanctions for reconsideration ("Remand II"). See Giacumbo II, 951 F.Supp. at 1160. Remand II was accompanied by the district court's observation that "this Court deems it proper for the IRB to contemplate the wisdom of ever permitting Giacumbo to hold a position of influence within the IBT or any IBT-affiliated entity, given his documented history of misconduct and his startling arrogance of power." Id.

Following Remand II, the IRB issued an opinion and decision on May 15, 1997, based on the findings made during the initial and supplemental hearing, a letter dated February 3, 1997 from the Chief Investigator and information solicited from Giacumbo's attorney. The IRB found that, based on his "presence in Philadelphia during the IBT convention in July 1996 when he met with at least one Teamster official" and "his ongoing contacts with an IBT official," Giacumbo "displayed his continuing disregard for the discipline imposed on him by participating in union affairs and the union political processes." The IRB found that Giacumbo still had failed to pay the $1,600 fine, and that all of these violations, together with the prior violation of permitting himself to be nominated for IBT election, amounted to disrespect of the IRB and flaunting of the Consent Decree. These findings, in the wake of the district court's earlier statement that the ***142** IRB "contemplate the wisdom of ever permitting Giacumbo to

hold a position of influence within the IBT or any IBT- affiliated entity" resulted in the IRB's final sanction. The IRB ordered Giacumbo's permanent suspension from IBT membership, and barred any IBT- affiliated entity from paying Giacumbo any benefits. This time the district court issued an order affirming the IRB's sanctions. See Giacumbo III. This appeal followed.

Discussion

In affirming past decisions of the district court reviewing IRB determinations, we have found it unnecessary to determine the appropriate standard for review since we would affirm under "any reasonable standard of review." See, e.g., Simpson, 120 F.3d at 346 (citing United States v. IBT ("DiGirlamo"), 19 F.3d 816 819-20 (2d Cir.1994)); United States v. IBT ("Adelstein"), 998 F.2d 120, 124 (2d Cir.1993) (citing United States v. IBT ("Friedman & Hughes"), 905 F.2d 610, 617 (2d Cir.1990)); United States v. IBT ("Cimino"), 964 F.2d 1308, 1311 (2d Cir.1992) (same). Since this case does not admit of an easy affirmance "under any reasonable standard," we must now determine the appropriate standard of review.

[1] While we have acknowledged that the district court in many respects is in a unique position to administer a consent decree and interpret its terms, see United States v. Local 359, United Seafood Workers, 55 F.3d 64, 68-69 (2d Cir.1995), and have adverted to the possibility that "the district court's decisions implementing the Consent Decree are entitled to the same deference as those of the Administrator," see Friedman & Hughes, 905 F.2d at 616, upon closer consideration, we now believe that the district court should not be accorded any greater deference in its review of IRB applications than it would be accorded when it reviews agency actions under the Administrative Procedure Act ("APA"). Both the Consent Decree and the IRB Rules speak to the question of the standard of review by the district court: "In reviewing actions of the IRB, this Court shall apply the same standard of review applicable to review of final federal agency action under the [APA]." IRB Rules, Art. O; Consent Decree, Art. K (same). See also Simpson, 120 F.3d at 346.

[2] Nothing in the IRB rules mandates heightened deference by the Court of Appeals to the district court. The rules govern, inter alia, the relationship between the district court and the IRB, but they do not speak to the Court of Appeals. In none of the numerous cases arising from the Consent Decree have we held that the rules limit our review of the district court's review of IRB sanctions. The district court is in no better position than are we to review IRB decisions. "[T]he district court [is required] to treat decisions of the [IRB] with 'great deference'," DiGirlamo, 19 F.3d at 820; Friedman & Hughes, 905 F.2d at 616-17, and is not entitled to make independent factual findings, but is limited to the record before it. See SEC v. Chenery Corp., 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) ("Chenery II"). We believe that to accord the district court any heightened deference, on top of the heightened deference that court owes to the IRB, would serve no useful purpose and would conflict with the model of review of agency action which the Consent Decree and IRB Rules Article O contemplate. Accordingly, we will review the district court's review of the IRB using the standards that would apply if the district court were reviewing the determinations of an administrative agency.

[3][4] When considering a district court's review of an agency action "we give no deference to the lower court [but] review de novo whether the agency action satisfies the standards of the APA. In other words, [like the district court,] we review the record to determine whether the agency considered the relevant factors and acted within its discretion." Aquarius Marine Co. v. Pena, 64 F.3d 82, 87 (2d Cir.1995) (internal quotes and citations omitted). In fact, without expressly stating so, we have already applied this standard. In United States v. IBT ("Wilson"), 978 F.2d 68, 74 (2d Cir.1992), we placed ourselves in the shoes of the district court and effectively exercised de novo review when we reinstated the administrator's choice of sanction, rather than remanding to the district court, after *143 concluding that the district court erroneously substituted its chosen sanctions for those of the administrator.

[5] What then are the standards for our review of IRB determined

sanctions? Our review, like that of the district court, must be of a narrow scope, because this is an area where the IRB has been given wide discretion. See Wilson, 978 F.2d at 73. "The APA permits us to set aside the agency action only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A). Although narrow, appellate review of an administrative record must nonetheless be careful, thorough and probing." Ward v. Brown, 22 F.3d 516, 521 (2d Cir.1994).

[6][7] We review the IRB's findings of facts for "substantial evidence" on the whole record. See DiGirlamo, 19 F.3d at 820; Cimino, 964 F.2d at 1311. The substantial evidence test is deferential. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Illinois Cent. R.R. v. Norfolk & W. Ry., 385 U.S. 57, 69, 87 S.Ct. 255, 17 L.Ed.2d 162 (1966) (quoting Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966)). See also Simpson, 120 F.3d at 346-47. Substantial evidence "is more than a mere scintilla [and] means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Chrysler Corp. v. U.S. Envtl. Protection Agency, 631 F.2d 865, 890 (D.C.Cir.1980) (internal quotation and citation omitted); see also Simpson, 120 F.3d at 346 (applying same standard).

[8][9] Assuming that the agency's findings of fact are supported by "substantial evidence," inferences based on those findings are discretionary and can only be disturbed if they are "arbitrary and capricious." When reviewing inferences, we are "oblige[d] ... to guard against an agency [ ] drawing inferences that are 'arbitrary' in relation to the facts found, no matter how substantial may be the support for those facts." Midtec Paper Corp. v. United States, 857 F.2d 1487, 1498 (D.C.Cir.1988).

[10][11] When reviewing sanctions, our inquiry is limited to "whether the [IRB] made 'an allowable judgment in [its] choice of the remedy.' " Wilson, 978 F.2d at 73 (quoting Butz v. Glover

Livestock Comm'n Co., 411 U.S. 182, 189, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973)). We may only set aside the IRB's choice of sanctions where the sanctions are "unwarranted in law" or "without justification in fact." Butz, 411 U.S. at 186, 188, 93 S.Ct. 1455.

[12][13] Imposing a sanction based on an improper understanding of the law is always an abuse of discretion, see Mendenhall v. NTSB, 92 F.3d 871, 874 (9th Cir.1996); Jaimez-Revolla v. Bell, 598 F.2d 243, 246 (D.C.Cir.1979)(per curiam), rendering the sanction arbitrary and capricious and therefore impermissible. See SEC v. Chenery Corp. 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943)("Chenery I")("[A]n order may not stand if the agency has misconceived the law."); Chenery II, 332 U.S. at 196, 67 S.Ct. 1575 ("If those grounds [invoked by an agency] are inadequate or improper, the court is powerless to affirm the administrative action...."). This is true even though the administrative agency, or in this case the IRB, permissibly could have imposed that very same sanction if it had done so. Compare Chenery I, 318 U.S. at 95, 63 S.Ct. 454 (remanding to Commission for further proceedings consistent with opinion) with Chenery II, 332 U.S. at 196, 209, 67 S.Ct. 1575 (accepting an identical result based on the SEC's properly recast rationale). Said a bit differently, if a sanction is imposed as a result of an exercise of discretion that is impermissibly limited as a result of a mistaken view by the agency as to the scope of its discretion or an impermissible narrowing of the agency's discretion by the district court, there has been a misunderstanding of law and the sanction must be vacated as arbitrary and capricious.

[14] Examining the whole record, we uphold the IRB's findings of fact upheld by the district court in Remand II for substantially the reasons stated by the district court. ***144** However, the inference that Giacumbo violated his suspension based on his "presence in Philadelphia during the IBT convention in July 1996 when he met with at least one Teamster official" and "his ongoing contacts with an IBT official" is arbitrary and capricious and must be vacated. Giacumbo was under no prohibition from associating

with IBT members or officers or from being in Philadelphia during the IBT convention. The record does not establish that Giacumbo gained access to meetings open only to IBT officers or members, or otherwise acted or spoke with the apparent authority of an IBT officer or member.

[15] Finally, we conclude that the final sanctions imposed on Giacumbo by the IRB cannot stand. Giacumbo's lifetime ban from IBT membership and office did not occur in a vacuum, but resulted from the district court's repeated remand orders that effectively, if not explicitly, required the IRB to impose ever stricter sanctions. The district court buttressed its successive remands with a series of arguments that do not withstand scrutiny.

[16][17] Remand I did not consider the merits of the case, but was based purely on the notion that "the sanctions imposed by the IRB are not commensurate with the severity of the charges levelled against Giacumbo." Giacumbo I, 910 F.Supp. 139 (S.D.N.Y.1996). This was an improper basis for overturning the IRB's choice of sanctions. The court must sustain the IRB's determination "unless it finds the penalty 'unwarranted in law' or 'without justification in fact.' " Wilson, 978 F.2d at 73 (quoting Butz, 411 U.S. at 185-86, 93 S.Ct. 1455), in other words, after a merits review. The IRB's choice of sanction is not only predicated on the charges proven, but also on the reproach brought upon the IBT. We have no doubt that it was within the discretion of the IRB, upon considering the events leading to the charges and the harm caused to the IBT, to impose a six month suspension as a sanction even upon these charges.

[18] When it rejected Sanction II, a three year membership suspension and $1,600 fine, and remanded for reconsideration, the district court did review the merits. But its decision, embodied in Remand II, was based upon comparisons with other cases, leading the district court to conclude that a three year suspension was so lenient as to be arbitrary and capricious. Uneven application of sanctions does not normally render the sanction imposed in a particular case arbitrary and capricious. See Butz, 411 U.S. at 187, 93 S.Ct. 1455; Wilson, 978 F.2d at

73-74 (finding that is was error for the district court to set aside a five year sanction based on reasoning that it was much milder than the lifetime suspension imposed in comparable cases, absent a finding that the sanction was arbitrary and capricious).

At the supplemental hearing, after reviewing the whole record, the IRB concluded that "when viewed on a relative scale the absolute consequence of the misconduct on the membership is not as great as perhaps in some other cases...." We cannot fault this conclusion, given that the $1,600 in double car reimbursements Giacumbo was found to have embezzled did not result from Giacumbo circumventing any financial controls. When he did circumvent financial controls, no unjust enrichment resulted except for the admittedly small gain resulting from his purchase of a computer game book.

[19] The choice of appropriate sanctions for impermissibly permitting Allways to join the union was also peculiarly within the purview of the IRB. Increasing union membership is usually a laudable goal. We think the IRB should have wide discretion in choosing if and how to censure actions that normally benefit the IBT, but which are improperly motivated.

The instant case is therefore readily distinguishable from the cases cited by the district court. Cf. United States v. IBT ("Ligurotis"), 814 F.Supp. 1165 (S.D.N.Y.1993) (union official permanently barred for hiring convicted felons, possessing a handgun on the Local's premisses, granting himself an unauthorized loan of $76,250, embezzling $77,000, and engaging in a pattern of conduct fostering corruption); United States v. IBT ("Caldwell"), 831 F.Supp. 278 (S.D.N.Y.1993) (union official permanently barred from IBT office for embezzling $3,231.25 in union funds ***145** by using union funds to pay legal expenses for two IBT members refusing to answer Independent Investigator's questions despite receiving a letter warning him not to do so); United States v. IBT ("Morris & McNeil"), 777 F.Supp. 1123, 1124-25 (S.D.N.Y.1991) (upholding five year suspension of IBT officials based on their use of a variety of devices, including back-dated petitions to amend the local bylaws and falsified

minutes to fraudulently grant themselves a $60,000 raise); United States v. IBT ("Perrucci"), No. 88 Civ. 4486 (S.D.N.Y., Dec. 11, 1996) (office manager agreed to resign from any IBT or Local office, 10 year membership suspension, and lifetime ban from holding office in IBT or IBT affiliates based on a charge that she embezzled $10,000 by misusing credit card and issuing unauthorized checks to herself).

[20][21] In fact, if we compare the circumstances and sanctions in this case with those in Morris & McNeil, 777 F.Supp. at 1124-25 and Wilson, 978 F.2d at 71 (officials suspended from position for five years embezzling $5,626 in local funds by circumventing financial safeguards), it is evident that there was nothing arbitrary and capricious about Giacumbo's six month suspension, much less the three year suspension. Those cases imposed five year suspensions from any IBT or Local office due to embezzlement effectuated by circumventing financial controls and in amounts considerably greater than in this case. Giacumbo's six month suspension as a union official was shorter, but he was also suspended from IBT membership, which prevented him from running for office in the upcoming election, and ordered to repay the $1,600. We have been given no reason to doubt that the IRB imposed its first sanctions after considering the harm to the IRB, the facts surrounding the violations, the character of the charges and the appropriate type of sanction in deciding how to deal with the violations. As we have said, the district court erred in vacating the first sanctions without a merits review. It was also error for the district court to substitute its judgment for that of the IRB following its merits determination of the three year membership suspension of Sanction II. Finally, the district court plainly exceeded its appellate role on the second remand when it suggested sanctions to the IRB.

The net result of all that occurred is that the progression of district court reviews misled the IRB into believing that it had to impose sanctions within a much narrower and stricter range than in fact it was permitted and obliged to consider. Inexorably, this led to a final sanction that was based on a mistake of law and thus was arbitrary and capricious.

It seems evident that the district court was trying to accomplish indirectly what we previously found impermissible in Wilson where the district court directly imposed a lifetime ban. The district court strongly suggested what it believed an appropriate sanction should be: "this Court questions Giacumbo's fitness to ever again hold a position of trust, influence, or authority within the IBT, its Local Unions, or any other IBT-affiliated entity." Giacumbo II, 951 F.Supp. at 1160.

[22] In Wilson, after vacating the sanctions imposed by the district court, we were able to reinstate the original sanctions. We cannot do so here, however, because the IRB is permitted to consider conduct subsequent to the imposition of sanctions. Cf. Wilson, 978 F.2d at 74. We therefore vacate the IRB's second and third sanctions and remand to the district court with instruction to remand to the IRB for it to consider whether the first sanction should stand or be modified due to any subsequent misconduct by Giacumbo in violation of the IRB's October 31, 1995 order.

II. The Recusal Request

Background

Nine days before the first IRB Hearing on May 24, 1995, Time Magazine published an article critical of IRB member Lacey entitled "A Teamsters Tempest: Was a retired judge too soft in his handling of an investigation of labor boss Ron Carey?" Richard Behar, A Teamsters Tempest, Time, May 15, 1995, at 45. The article stated that "Time has obtained a private letter written by [Judge] Lacey in April 1994, amid his investigation of Carey, that raises questions about his impartiality." ***146** In the letter to Thomas Puccio, a court-appointed trustee of a Teamsters local, Lacey reminded Puccio--who had threatened to publicize information regarding Carey's mafia ties--that

> I told you that I thought you ... ought to have in mind what would happen if you brought Carey down in that there were 'old guard' teamsters throughout the country that were hoping that Carey would be eliminated as a candidate in 1996 so that the

clock could be turned back to what it was when I first came on the scene as Independent Administrator.

Id. The IRB later acknowledged that Giacumbo, during his IBT Vice Presidency following his election on the Carey ticket, was a source of information that Carey had ties to organized crime, see Independent Review Board Report of Investigation of General President Ronald Carey, 41, 44 (July 11, 1994), and Giacumbo had been quoted in an earlier Time Magazine article as saying: " 'I believe [Carey has] been dancing with more than one partner--the Federal Government and the underworld-just like [former Teamster boss] Jackie Presser.' " Edward Barnes & Richard Behar, Rich Man, Poor Man, Time, Apr. 11, 1994, at 42.

On May 16, 1995, Giacumbo wrote a letter to John Cronin, the administrator of the IRB. He brought to Cronin's attention the May 15 Time magazine article, asserted that Lacey was biased in Giacumbo's case, and requested his recusal. When Lacey refused to do so, Giacumbo moved in the district court for a hearing on the question. The district court denied that application on May 22, 1996, finding that Lacey was not involved in the events underlying the charges against Giacumbo. In so finding, the district court applied the "involved officer or member" standard set forth in the IBT Constitution, art. XIX, § 1(a), and expressly declined to adopt either the "appearance of partiality" standard applicable to federal judges, see 28 U.S.C. § 455(a), or the "evident partiality" standard used in arbitration hearings, see 9 U.S.C. § 10(a)(2). See Giacumbo II, 951 F.Supp. at 1129- 30.

Discussion

[23][24] Whether the correct recusal standard was employed is a question of law which we review de novo. See Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82-84 (2d Cir.1984). IRB members are not United States Judicial Officers and are therefore not subject to the "appearance of partiality" test set forth in 28 U.S.C. § 455(a) which requires recusal by a judge "in any proceeding in which his impartiality might reasonably be questioned." Instead, the governing recusal standard is determined by the IRB Rules, which

establish that "[t]he hearings shall be conducted under these Rules and the rules and procedures generally applicable to labor arbitration hearings." IRB Rules, Art. J.6. In labor arbitration hearings, the "evident partiality" standard applies. See Morelite, 748 F.2d at 82-84 ("evident partiality" standard applied to arbitrator in a proceeding to enforce a collective bargaining agreement); Local 814, IBT v. J & B Sys. Installers & Moving, 878 F.2d 38, 40 (2d Cir.1989) (per curiam) (standard applied to arbitrator in grievance proceeding). This is the same standard that applies to arbitrators generally under 9 U.S.C. § 10(a)(2), allowing federal courts to vacate an arbitration award "[w]here there was evident partiality ... in the arbitrators, or either of them." Thus, we believe that the standard by which Lacey's refusal to recuse must be determined is "evident partiality" and that the district court therefore erred in using the more lenient "involved officer or member" standard found in art. XIX 1(a) of the IBT Constitution.

[25][26][27] The "evident partiality" standard is less strict than the "appearance of partiality" standard applicable to judges. See Local 814, 878 F.2d at 40; Morelite, 748 F.2d at 83. "The test for an appearance of partiality is ... whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." DeLuca v. Long Island Lighting Co., 862 F.2d 427, 428-29 (2d Cir.1988) (internal quotation and citation omitted). Before recusal is required under the "evident partiality" test, a party ***147** must demonstrate that a "reasonable person would have to conclude that [the] arbitrator was partial to one party to the arbitration." Morelite, 748 F.2d at 84. Partiality need not be actually proven to be the basis for a reasonable conclusion of partiality, but it may not be based simply on speculation either. See Local 814, 878 F.2d at 41. An integral part of the reasonable person test is an assessment of the facts established by the party alleging bias. See In Re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1313 (2d Cir.1988); United States v. District Council of New York City, 941 F.Supp. 349, 358 (S.D.N.Y.1996).

[28] As noted above, the facts pertaining to the recusal motion in

this case were assessed by the district court under the incorrect "involved officer or member" standard and found not to warrant Lacey's recusal under that standard. Whether the district court would have reached the same conclusion under the correct "evident partiality" standard remains an open question. As we have indicated, the test we endorse does not depend upon proof of actual partiality. Under the "evident partiality" standard, the bar the movant must clear is somewhat lower than actual partiality. The facts in United States v. IBT ("Simpson"), 120 F.3d 341, 347-48 (2d Cir.1997) are not dissimilar from those presented here; however, in Simpson we referenced the applicable standard as one of "bias" which may be equated to actual partiality. We did not review the conduct in question in that case under the more precise formulation of evident partiality. We believe that the allegations are such that the appropriate course is for us to remand to the district court for reconsideration of the recusal motion under the "evident partiality" standard. On remand, we expect the district court to consider Simpson as now modified by our formulation of the appropriate recusal standard.

Conclusion

The order of the district court is vacated and the case remanded for further proceedings consistent with this opinion. Each party shall bear its own costs.

JACOBS, Circuit Judge, concurring:

I fully concur in the opinion of the Court, and I write separately to expand briefly on why I believe we are compelled to specify which legal standard governs the recusal issue in this case and why having done so, we are unable to affirm summarily.

The record contains an article from Time magazine that describes a letter from Independent Review Board (IRB) member Frederick B. Lacey to Thomas Puccio, a court-appointed trustees of a Teamsters local. According to Time, the letter warns Puccio against disclosing, during a teamsters election campaign, information that allegedly tied then-Teamsters President Ron

Carey to organized crime. As quoted in Time, Lacey advised Puccio to keep "in mind what would happen if you brought Carey down in that there were 'old guard' Teamsters throughout the country that were hoping that Carey would be eliminated as a candidate in 1996 so that the clock could be turned back to what it was when I first came on the scene as Independent Administrator." This report (if true) is unsettling because the letter is partisan in an election in which Lacey has no vote and should have no candidate.

News reports are of no moment, but at oral argument I asked counsel for the IRB whether Lacey denied having written the letter. The answers given, though evasive, were consistent with a concession that such a letter was sent.

In light of that letter, and the fact that the report of it is not disclaimed, it matters (unfortunately) which of several standards of recusal governs members of the IRB. On the one hand, it is clear enough that if the standard for federal judicial officers were applied, Lacey would have had to recuse himself. It is also clear as a matter of law that the IRB does not have the latitude that is permitted to a Teamsters president, and that the lax standard of recusal for such ōfficial should not have been applied. We are then left with an intermediate standard that governs the recusal of arbitrators: evident partiality. I am unwilling to say as a matter of law that Lacey's recusal is not required under that standard.

***148** Under the circumstances, Giacumbo could reasonably believe that an IRB member who would urge suppression of information adverse to Carey in an election might condemn Giacumbo for a small collection of petty offenses as part of an effort to rid the union of elements antagonistic to Carey. Whether that is so or not--and on the whole, I doubt it--is a question we cannot fairly decide as a matter of law.

In light of the deference that we have in the past extended to Lacey's judgment and prestige, our inability to affirm summarily under the highest standard of impartiality, or the intermediate one, is a depressant.